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PRECEDENTS
OF
INDICTMENTS AND PLEAS,

ADAPTED TO THE USE BOTH OF THE
COURTS OF THE UNITED STATES

AND THOSE OF ALL THE
SEVERAL STATES;

TOGETHER WITH NOTES ON
CRIMINAL PLEADING AND PRACTICE,

EMBRACING THE
ENGLISH AND AMERICAN AUTHORITIES GENERALLY.

BY
FRANCIS WHARTON, LL.D.,
AUTHOR OF TREATISES ON CRIMINAL LAW; ON EVIDENCE; ON NEGLIGENCE;
AND ON MEDICAL JURISPRUDENCE.

FOURTH AND REVISED EDITION.

VOL. I.

PHILADELPHIA:
KAY & BROTHER, 17 AND 19 SOUTH SIXTH STREET,
LAW BOOKSELLERS, PUBLISHERS AND IMPORTERS.
1881.

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1881

Entered according to the Act of Congress, in the year 1848, by
KAY AND BROTHER,
in the Office of the Clerk of the District Court of the United States in and for the
Eastern District of Pennsylvania.

Entered according to the Act of Congress, in the year 1857, by
KAY AND BROTHER,
in the Office of the Clerk of the District Court of the United States in and for the
Eastern District of Pennsylvania.

Entered according to Act of Congress, in the year 1871, by
KAY AND BROTHER,
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RJF 14 Sep 53

PREFACE TO FOURTH EDITION.

IN the present edition several superfluous forms have been thrown out ; a number of new forms have been introduced ; and the notes have been carefully revised and largely increased.

F. W.

NARRAGANSETT PIER, R. I.,

August 3, 1881.

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PREFACE TO THIRD EDITION.

IN the following pages I have introduced a series of new precedents, based on recent legislation, dropping such forms as have become obsolete; and I have added to the notes such English and American decisions on criminal pleading as have appeared since the last edition was prepared.

F. W.

March, 1871.

PREFACE TO SECOND EDITION.

IN this edition a large number of new precedents have been added, and those given in the former edition modified, so as to adapt the collection, as far as is practicable, to the practice of the criminal courts at the present period throughout the entire Union. In addition to this, both the text and the notes have been remodelled and classified, so as to place them on a uniform basis, both as to interchange of references, and harmony of subject matter, with the fourth and revised edition of my work on American Criminal Law, which issues simultaneously with this through the press.

F. W.

May 1, 1857.

P R E F A C E.

ON submitting to the profession, in 1846, a Treatise on American Criminal Law, my first design was to annex to it a Collection of Precedents of Indictments and Pleas suited to the use of practitioners throughout the Union. The great number of forms, however, which the varying systems of the federal and state courts made necessary, and the large amount of notes called for, both by the newness of the material and by the increasing intricacy of criminal pleading, led to a variation from my original plan. The forms which are now presented may be considered under three classes: first, those which have been directly sustained by the courts; second, those which have been prepared by eminent pleaders, but which have not been judicially tested; and third, those which have been drawn from the English books. Those composing the *first* class, wherever the pleading in the particular case is not set out in the report, have been made up by recourse to the records of the court in which the trial took place. In preparing the *second*, I have to acknowledge my indebtedness to the printed volume of Mr. DANIEL DAVIS, for many years solicitor-general of Massachusetts, and to a manuscript collection, begun in 1778, by Mr. BRADFORD, attorney-general successively of Pennsylvania and of the United States, and continued by Mr. J. D. SERGEANT, Mr. JARED INGERSOLL, Mr. CHARLES LEE, Mr. RAWLE, Mr. A. J. DALLAS, and Mr. RUSH, who were either his contemporaries, or his immediate successors, in the state or federal prosecutions. In selecting the forms which fall under the *third* head, I have relied chiefly on the treatises of Mr. STARKIE,

PREFACE.

Mr. ARCHBOLD, and Mr. DICKINSON, introducing, in addition, a series of indictments which have been sustained by the English courts since the date of those publications.

In the first book is given a general form of indictment with caption, commencement, and conclusion; adapted to the federal courts, and to those of the several states; and to each averment in the text is attached a note incorporating the doctrine bearing upon it. The indictments relating to each individual offence are in like manner preceded by a general preliminary form, to which are appended notes divided on the same principle of analysis. On such a plan, the duty of the Editor is first to separate the authorities, English and American, into compartments corresponding in subject matter with the several averments in the indictment, and then to connect with each of them, in the order in which they stand, its own particular portion of commentary. It is plain, that the value of a work thus prepared must depend upon the fidelity with which, both in text and note, the settled law is observed; and I have thought it judicious, therefore, when referring to the English learning, to depend chiefly on the expression given to it by the recognized English commentators. On this principle, I have placed great reliance on the very elaborate and lucid notes by Mr. SERJEANT TALFOURD to Dickinson's Quarter Sessions, many of which I have incorporated at large, and which may be safely referred to, as containing not only the most modern, but the most succinct exposition of the English crown law of pleading. I should be doing great injustice, not only to myself, but to others to whose prompt and intelligent kindness I am under the strongest obligations, did I withhold, at the close of this undertaking, my thanks to the many professional brethren, both here and throughout the Union, from whom I have received aid during its progress.

PHILADELPHIA, *November*, 1848.

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BOOK I.

GENERAL FORM OF INDICTMENT.

CHAPTER I.

CAPTION.

GENERAL COMMENCEMENT OF CAPTION.

(1) STATE OF, etc. etc. (*Giving state and county.*) At(a) the general quarter sessions of the peace (*stating style of court*),(b) holden at Washington (*stating county town, or wherever the court is holden*) in and for the county aforesaid,(c) the day of in the year of our Lord one thousand eight hundred and forty,(d) before A. B. and C. D., esquires, and others their associates, justices of the said state, assigned to keep the peace of the said state, and also to hear and determine divers felonies, trespasses and other misdemeanors, in the said county committed, by the oaths (or oaths and affirmations) of (*naming the grand jurors*),(e) good and lawful men of the county aforesaid,(f) then and there sworn and charged(g) to inquire for the said state, and for the body of the county aforesaid, it is presented that, etc.(h)

(a) The caption is no part of the indictment. 1 East P. C. 113; Fost. 2; Ch. C. L. 327; 1 Saund. 250 d, n. 1; 1 Stark. C. P. 238; R. v. March, 6 A. & E. 236; State v. Gary, 36 N. H. 359; State v. Gilbert, 13 Vt. 647; State v. Thibau, 30 Vt. 100; People v. Jewett, 3 Wend. 319; People v. Bennett, 37 N. Y. 117; State v. Price, 6 Halst. 203; Berrian v. State, 2 Zab. 9; State v. Smith, 2 Harring. 532; State v. Brickell, 1 Hawks, 354; State v. Haddock, 2 Hawks, 261; Noles v. State, 24 Ala. 672. See Caldwell v. State, 3 Baxter, 429. Its object is to state the style of the court, the time and place of its meeting, the time and place where the indictment was found, and the jurors by whom it was found; and these particulars it must set forth with reasonable certainty for the use of a superior or appellate court to which it may be removed. U. S. v. Thompson, 6 McLean, 56; State v. Conley, 39 Me. 78; McClure v. State, 1 Yerg. 206; English v. State, 4 Tex. 125; Reeves v. State, 20 Ala. 33. Facts

essential to jurisdiction in the trial court must in this way be spread on record. *State v. Hunter*, Peck's Tenn. R. 166. See *State v. Fields*, *Ibid.* 140; *State v. Williams*, 2 McCord, 301.

In England, the caption in general does not appear until the return to a writ of *certiorari*, or a writ of error, yet, in cases of high treason, the defendant is entitled to a copy of it in the first instance, after the finding of the indictment, in order that he may be acquainted with the names of the jurors by whom it was presented. 1 East P. C. 113; Fost. 2; Ch. C. L. 327. As it forms no part of the indictment, it has been held no ground for arresting judgment that the indictment does not show, in its caption, that it was taken in the State; for, it is said, while it stood on the records of the court below, it appeared to be an indictment of that court, and, when sent to the Supreme Court, the caption of the record, of which it is a part, officially certified, renders it sufficiently certain. *State v. Brickell*, 1 Hawks, 354; 1 Saunders, 250 d, n. 1. If wholly omitted in the court below, it is said the indictment may nevertheless be sufficient, as the minute of the clerk upon the bill, at the time of the presentment, and the general records of the term, will supply any defect in such preface. *State v. Gilbert*, 13 Vt. 647; *State v. Smith*, 2 Harring. 532.

In North Carolina it was held that a caption to an indictment is only necessary where the court acts under a special commission. *State v. Wasden*, N. C. Term, 163.

Giving only the initials of the first names of the grand jurors is no defect. *Stone v. State*, 30 Ind. 115.

In Massachusetts practice, it seems, each indictment is framed with its own special caption, instead of leaving the caption to be made up, as is the usual and better course, from the records of the court, by the clerk, when the record is taken into another court. Yet even in Massachusetts, this "caption," if it is so to be called, is purely formal, and is amendable. See *Com. v. Edwards*, 4 Gray, 1. See also *State v. Conley*, 39 Me. 78. The allegation "at the court" etc. implies that the grand jury were sworn in open court.

(b) When the indictment is returned from an inferior court, in obedience to a writ of *certiorari*, the statement of the previous proceedings sent with it is termed the *schedule*, and from this instrument the caption is extracted. 1 Saund. 309. The style should properly represent the court, so as to show it to have jurisdiction, this being the chief object of the caption. *Dean v. State*, Mart. & Yerg. 127; *State v. Lisle*, 5 Halst. 348; 2 Hale, 165; 2 Hawk. c. 25, s. 116, 117, 118, 119, 120; Burn's Just. 29th ed., Indict. ix. When taken from the schedule it is entered upon the record, and prefixed to the indictment. 2 Hale, 165; Bac. Ab. Indictment, J.; Burn. J., Indictment, ix.; Williams, J., Indictment, iv. The object being to show that the inferior court had jurisdiction, a certainty in that respect is requisite. 2 Sessions Cases, 316; 1 Ch. C. L. 327. See *State v. Wasden*, 2 Taylor N. C. 163; *State v. Haddock*, 2 Hawks, 461; 2 Hale, 165; 2 Hawk. c. 25, ss. 16, 17, 118, 119, 120; Burn's Justice, 29th ed. by Chitty & Bears, Indict. ix.; *Dean v. State*, Mart. & Yerg. 127; *State v. Zule*, 5 Halst. 348. But a formal statement in the indictment that it was found by the authority of the State is not necessary, if it appear, from the record, that the prosecution was in the name of the State. *Greeson v. State*, 5 Howard's Miss. 33.

(c) Next to the statement of the court follows the name of the *place* and *county* where it was holden, and which must always be inserted; Dyer, 69, A.; Cro. Jac. 276; 2 Hale, 166; 2 Hawk. c. 25, s. 128; Bacon Ab. Indictment, i.; and though it may be enough, after naming a place, to refer to "the county aforesaid," yet, unless there be such express reference to the county in the margin, or it be repeated in the body of the caption, it will be insufficient. 2 Hale, 180; 3 P. Wms. 439; 1 Saund. 308, n.; Cro. Eliz., 137, 606, 738; U. S. v. Wood, 2 Wheel. C. C. 336. This is necessary in order to show that the place is within the limits of the jurisdiction. *R. v. Stanbury*, L. & C. 128. As to venue see Wh. Cr. Pl. & Pr. § 139. Hence, whether the caption wholly omit the place, or do not state it with sufficient certainty, the proceedings will be alike

invalid, though amendable. Cro. Jac. 276; 2 Hale, 166; 2 Hawk. c. 25, s. 128; Bac. Ab. Indictment, i. If, therefore, the caption state the inquisition to be taken only at the town, without adding "*the county aforesaid*," the omission will vitiate unless amended. Cro. Eliz. 137, 606, 738, 751; 2 Hale, 166; 2 Hawk. c. 25, s. 128; Bac. Ab. Indictment, i.; Williams, J., Indictment, iv.; U. S. v. Wood, 2 Wheel. C. C. 336. See Teft v. Com., 8 Leigh, 721.

The omission of "North Carolina," in an indictment found in a court in that state, where the name of the county is inserted in the margin or body of the indictment, is not a cause for arresting the judgment. State v. Lane, 4 Ired. 113. An indictment in the same state, containing in its caption a statement of the term in these words: "Fall Term, 1822," and, in the body of the indictment, charging the time of the offence in these words: "On the first day of August in the present year," was held good; and it was said that there was no necessity for stating any time in the caption of an indictment found in the county or supreme courts. State v. Haddock, 2 Hawks, 461.

In Massachusetts, an indictment with this caption: "Commonwealth of Massachusetts, Essex, to wit: At the Court of Common Pleas, begun and holden at Salem, within and for the county of Essex," on a certain day, sufficiently shows that it was found at a court held in this Commonwealth. Com. v. Fisher, 7 Gray, 492. See also Jeffries v. Com., 12 Allen, 145; Com. v. Mullen, 13 Allen, 551. In the same state, an indictment which purports by its caption to have been found at a court of common pleas for the county of Hampshire, and in the body of which "the jurors of said commonwealth on their oath present," sufficiently shows that it was returned by the grand jury for the county of Hampshire. Com. v. Edwards, 4 Gray, 1; Wh. Cr. Pl. & Pr. § 134. And in Maine, where the record commenced: "State of Maine, Cumberland, ss. At the Supreme Court begun and holden at Portland, within the county of Cumberland," it was held that this was sufficient to show that the court at which the indictment was found was held for that county in the State of Maine. State v. Conley, 39 Me. 78; Wh. Cr. Pl. & Pr. § 139. For other rulings on captions see Davis v. State, 19 Oh. St. 270; Lovell v. State, 45 Ind. 550; Woodsides v. State, 2 How. Miss. 655; Reeves v. State, 20 Ala. 33.

A party was indicted for murder in the Circuit Court for Carroll County, was arraigned, pleaded not guilty, and was put upon his trial; the jury failing to agree were discharged, and at the suggestion of the prisoner, the record of proceedings was transmitted to the Circuit Court for Washington County. The transcript of the record so transmitted stated that the grand jurors who found the presentment were "good and lawful men of Baltimore County." All the proceedings prior and subsequent to this statement were properly recorded as of Carroll County. It was ruled that this did not vitiate the indictment. Davis v. State, 39 Md. 353.

(d) The term of court need not be set out. State v. Haddock, 2 Hawks, 462.

(e) In England it was once held that the indictment must, in all cases, be shown to have been taken *upon oath*, and if this allegation be omitted, the caption cannot be supported. 2 Keb. 676; 1 Keb. 329; 1 Sid. 140; 3 Mod. 202; 2 Hale, 167; 2 Hawk. c. 25, s. 126; Bac. Ab. Indictment, i.; Burn, J., Indictment, ix.; Williams, J., Indictment, iv. It is otherwise, however, under statutes permitting affirmations. And an indictment purporting to be presented by the grand jurors "upon their oath and affirmation" need not state the reasons why any of the jurors affirmed instead of being sworn. Muleahy v. R., 3 L. R. H. L. Cas. 306; Com. v. Brady, 7 Gray, 320; Com. v. Fisher, 7 Gray, 492, cited *infra*. See, however, State v. Harris, 2 Halst. 361.

Whether "oath" or "oaths" is averred is immaterial. Com. v. Sholes, 11 Allen, 554; State v. Dayton, 3 Zab. 49; Wh. Cr. Pl. & Pr. § 277.

It must appear at common law on the face of the record, that the bill was found by at least twelve jurors, or it will be insufficient. Cro. Eliz. 654; 2 Hale, 167; 2 Hawk. c. 25, ss. 16, 126; 1 Saund. 248, n. 1; Andr. 230; Bac. Ab. Indictment, i.; Burn, J., Indictment, ix.; Williams, J., Indictment, iv.

Where the statute requires more than twelve, the requisite number must be averred. *Fitzgerald v. State*, 4 Wis. 395. They are usually described, also, as "good and lawful men," which is sufficient (2 Hale, 167; *Cro. Eliz.* 751; 1 Keb. 629; *Cro. Jac.* 635; *State v. Price*, 6 Halst. 203; see *State v. Jones*, 4 Halst. 357); but this is not in England absolutely essential, especially when the indictment is found in a superior court, because all men shall be so regarded until the contrary appear. 2 Keb. 366; 2 Hawk. c. 25, ss. 16, 126; *Bac. Ab. Indictment*, i.; *Burn, J., Indictment*, ix.; *Williams, J., Indictment*, iv.; *Stark, C. P.* 236-7; *R. v. Butterfield*, 2 M. & R. 522. See *Jerry v. State*, 1 Blackf. 395; *Beauchamp v. State*, 6 Blackf. 299; *Bonds v. State*, Mart. & Yerg. 143; *State v. Glasgow*, Conf. 38; *State v. Yancy*, 1 Tread. 237. The caption then must state that they are "*of the county aforesaid*," or other vill or precinct for which the court had jurisdiction to inquire; and, if these words are omitted, the whole will be vicious. *Tipton v. State*, Peck's R. 8; *Cornwell v. State*, Mart. & Yerg. 147; *Cro. Eliz.* 667; 2 Keb. 160; 2 Hale, 167; 2 Hawk. c. 25, ss. 16, 126; *Bac. Ab. Indictment*, i.; *Burn, J., Indictment*, ix.; *Williams, J., Indictment*, iv. The caption, by implication at least, must show that the grand jury were of the county where the indictment was taken. *Tipton v. State*, Peck's Tenn. R. 308; per *Haywood and Beck, JJ., contra*, *White, J.*; *Woodside v. State*, 2 How. (Miss.) 655. It is not, under the present practice, requisite to give the names of the grand jurors. *R. v. Aylett*, 6 A. & E. 247; *R. v. Marsh*, *Ibid.* 236. If the names are given, a variance as to one of them is not fatal. *State v. Norton*, 3 Zab. 33; *State v. Dayton*, *Ibid.* 49. How far specification is necessary, see *Wh. Cr. Pl. & Pr.* §§ 345 *et seq.*

Where it appeared by the record that a foreman was appointed, and the indictment was returned, signed by him, and the caption stated that the grand jury returned the bill into court by their foreman, it was held sufficient evidence that the bill was returned by the authority of the grand jury. *Greeson v. State*, 5 How. Miss. R. 33. See *Wh. Cr. Pl. & Pr.* § 368.

As has been seen, where the caption avers the affirmation of some of the grand jurors, it is said, in New Jersey, that it must appear that they were persons entitled by law to take affirmations in lieu of oaths, *State v. Harris*, 2 Halsted, 361; but such is not the usual practice; the indictment going no further, in most states, than to aver the fact of its being made on the oaths and affirmations of the grand jurors. *Com. v. Fisher*, 7 Gray, 492.

If the caption omit to state that the grand jury were sworn, it will be presumed they were sworn; at least the recital in the record that "the grand jury were elected, empanelled, sworn, and charged," will be sufficient. *McClure v. State*, 1 Yerg. 206, per *Catron, J.*

In North Carolina, the courts have gone so far as to pronounce no necessity to exist for a caption at all, except where the court acts under a special commission. *State v. Brickell*, 1 Hawks, 354; *State v. Haddock*, 2 Hawks, 462; see 1 Saunders, 250, d, n. i. Where it is wholly omitted in the court below, it may be supplied on error by the minute of the clerk on the bill at the time of presentment, and the general record of the term. *State v. Gilbert*, 13 Vt. 647; *State v. Murphy*, 9 Port. 486; *State v. Smith*, 2 Harring. 532; *Kirkpatrick v. State*, 6 Miss. 471; *State v. Thompson*, Wright's R. 617; *State v. Rose*, 1 Ala. 29. In fact, in most of the States it is now rarely tacked on, except in error. In Pennsylvania, *Penn. v. Bell*, Add. 156; in South Carolina, *State v. Williams*, 2 McCord, 301; *Vandyke v. Dail*, 1 Bail. 65; in Indiana, *Moody v. State*, 7 Blackford, 424; and in New Jersey, *State v. Jones*, 4 Halst. 457, it can be amended when in the court below, by reference to the record of the term, or when in error, by proper evidence of the facts. *State v. Norton*, 3 Zab. 33. That it is generally open to amendment, see last note to this chapter.

A caption, "Commonwealth of Massachusetts, Essex, to wit: At the Court of Common Pleas, begun and holden at Salem, within and for the county of Essex," etc., sufficiently shows that the indictment was found in Massachusetts.

Com. v. Fisher, 7 Gray, 492. See also Com. v. Edwards, 4 Gray, 1; State v. Conly, 39 Me. 78.

(f) The jury must appear to be of the "county aforesaid" (Tipton v. State, Peck's R. 8; Cornell v. State, Mart. & Yerg. 147); though the allegation, "empanelled and sworn in and for the county of Wilkinson and State of Mississippi," may supply its place. Woodsides v. State, 2 How. Miss. R. 655.

In New Jersey, where the caption states the finding to be on the oath *and affirmations* of the grand jury, it must appear that the affirming jurors were persons entitled by law to make affirmations instead of oaths. State v. Harris, 2 Halst. 457. This particularity does not seem elsewhere to have been held necessary; see Archbold's C. P. 5th Am. ed. 34; Com. v. Brady, 7 Gray, 320.

(g) The omission of the allegation "then and there sworn and charged," in New York, has been held fatal (People v. Guernsey, 3 Johns. 265); though in Mississippi, "then and there" are not considered indispensable (Woodsides v. State, 2 How. Miss. R. 655); and they do not appear in the precedent given by Mr. Archbold. Archbold's C. P. 5th Am. ed. 34. As appears in Beauchamp v. State, 8 Blackf. 304, the omission in Indiana is considered no error.

(h) See, as to this form generally, 2 Hale, 166; R. v. Fearnly, 1 Leach, 425. *Defects may be amended.* Defects in the caption of the indictment, as not naming the judges, the jurors, and the county, which would be fatal if the indictment were removed into a superior court, may be supplied in the court in which it is taken, by reference to other records there. Faulkner's case, 1 Saund. 249; R. v. Davis, 1 C. & P. 470; Broome v. R., 12 Q. B. 838; U. S. v. Thompson, 6 McLean, 156; State v. Brady, 14 Vt. 353; Com. v. Mullen, 13 Allen, 551; Com. v. Hines, 101 Mass. 33; Dawson v. People, 25 N. Y. 399; Pennsylvania v. Bell, Add. 173; Com. v. Bechtell, 1 Am. L. J. 414; Brown v. Com., 78 Penn. St. 122; Mackey v. State, 3 Oh. St. 362; State v. Creight, 1 Brev. 169; State v. Murphy, 9 Port. 487; Reeves v. State, 20 Ala. 33; Kirk v. State, 6 Mo. 469; State v. Freeman, 21 Mo. 481; Cornelius v. State, 7 Eng. 782; Allen v. State, 5 Wis. 329. As to Massachusetts practice see Com. v. Gee, 6 Cush. 174; Com. v. Stone, 3 Gray, 453; Com. v. Cullon, 11 Gray, 1. As to particularity required in Indiana see State v. Connor, 5 Blackf. 325. As to Wisconsin see Fitzgerald v. State, 4 Wis. 395; and see cases cited Wh. Cr. Pl. & Pr. § 91. And it is also held that the caption may be amended in the Supreme Court, on proper evidence of the facts; or the *certiorari* may be returned to the court below, and the amendment made there. State v. Jones, 4 Halst. 357; State v. Norton, 3 Zabr. 33; State v. Williams, 2 McCord, 301; Vandyke v. Dare, 1 Bailey, 65. See Wh. Cr. Pl. & Pr. § 368.

It is ordinarily sufficient for the commencement to state that the grand jurors of the State or Commonwealth, inquiring for the particular county or city, as the case may be, on their oaths or affirmations respectively, find the special facts making up the charge. The commencement of an indictment in these words, "the grand jurors for the people of the State of Vermont, upon their oath, present," etc., is sufficient, on motion in arrest of judgment. State v. Nixon, 18 Vt. 70. So when "oaths" and not "oath" is used. Com. v. Sholes, 13 Allen, 554; State v. Dayton, 2 Zabr. 49.

(1)

CAPTION.

FORMS OF CAPTIONS.

Circuit Court of the United States of America for the Southern District of New York in the Second Circuit.

Form of Captions.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held at the City of New York, within and for the circuit and district aforesaid, on the of in the year of our Lord one thousand eight hundred and

(Also) at a Special Term, etc.

At an additional sessions of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held at the City of New York, within and for the circuit and district aforesaid, on the of in the year of our Lord one thousand eight hundred and

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held at the City of New York, within and for the circuit and district aforesaid, on the day of in the year of our Lord one thousand eight hundred and and continued by adjournment (or adjournments) to the day of in the year last aforesaid.

District Court of the United States of America for the Southern District of New York.

Form of Captions.

At a Stated Term of the District Court of the United States of America for the Southern District of New York, begun and held at the City of New York, within and for the district aforesaid, on the first Tuesday of in the year of our Lord one thousand eight hundred and

At a Special Term, etc.

At a Stated Term of the District Court of the United States of America for the Southern District of New York, begun and held at the City of New York, within and for the district aforesaid, on the first Tuesday of in the year of our Lord one thousand eight hundred and and continued by adjournment (or adjournments) to the day of in the year last aforesaid.

State of New Jersey, Sussex County, ss.

Be it remembered, That at a Court of Oyer and Terminer and General Gaol Delivery, holden at Newton, in and for said County of Sussex, on the fourth Tuesday in May, in the year of our Lord one thousand eight hundred and twenty-seven, before the Honorable Gabriel H. Ford, Esq., one of the justices of the Supreme Court of Judicature of the State of New Jersey, and John Gustin, Joseph Y. Miller, Walter L. Shee, Aaron Hazen, and others, their fellows, judges of the Inferior Court of Common Pleas in and for the said county, according to the form of the statute in such cases made and provided, by the oaths of Elijah Emmitt, Absalom Dunning, John Layton, Nathaniel Vanauken, Isaac Bedell, Philip Smith, Philip Wyker, Thomas A. Dildine, Thomas B. Egbert, Joseph Greer, William D. Johnson, Abraham Dunning, Andrew Wilson, David Cumpton, Lewis Shuman, Nicholas J. Cox, John Lennington, Zenas Hurd, and the solemn affirmation of William Green, who alleges himself to be conscientiously scrupulous of taking an oath, good and lawful men of the said county, sworn, affirmed, and charged to inquire for the State, in and for the said body of the said County of Sussex, it is presented in manner and form following,

that is to say : Sussex County, ss. The jurors of the State of New Jersey, for the body of the County of Sussex, upon their oaths and affirmation, William Green, one of the said jurors, being the only person who affirmed, on the said jury, alleging himself to be conscientiously scrupulous of taking an oath, present that Zachariah Price, late of the township of Vernon, in the County of Sussex aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and twenty-seven, with force and arms, etc., at the township aforesaid, in the county aforesaid, and within the jurisdiction of this court, one barn of the property of one Nicholas Ryerson, not parcel of the dwelling-house of the said Nicholas Ryerson there situate, wilfully and maliciously did burn and cause to be burned, to the great damage of the said Nicholas Ryerson, to the evil example of all others in the like case offending, contrary to the form of the statute in such case made and provided, against the peace of this State, the government and dignity of the same. And afterwards, that is to say, at the same Court of Oyer and Terminer and General Gaol Delivery, holden at Newton aforesaid, in the county aforesaid, on Monday the twenty-eighth day of May, in the year last aforesaid, before the said Honorable Gabriel H. Ford, Esq., justice of the Supreme Court of Judicature, and John Gustin, Joseph P. Miller, Walter L. Shee, Aaron Hazen, and others their fellows, judges of the Inferior Court of Common Pleas in and for the said county, cometh the said Zachariah Price, in his proper person according to the condition of the recognizance by himself, and his pledges in that behalf heretofore made and now here, touching the premises in the said indictment above specified and charged upon him, being asked in what manner he will acquit himself thereof, he says he is not guilty thereof, and of this he puts himself upon the county ; and the said Alpheus Gustin, Esq., who prosecutes for the State in this behalf, does likewise the same ; wherefore let a jury thereupon come, to wit, on Monday the twenty-eighth day of May, in the year of our Lord eighteen hundred and twenty-seven, and as yet of the said term of May, before the said the Honorable Gabriel H. Ford, Esq., one of the justices of the Supreme Court of Judicature, and John Gustin, Joseph Y. Miller, Walter L. Shee, and Aaron Hazen, Esqrs., and others their fellows, judges of the Inferior Court of Common Pleas in and for the said county, of good and lawful men of the County of Sussex aforesaid, by whom the truth of the matter may be the better known, and who are not of kin to the said Zachariah Price, to recognize upon their oaths, whether the said Zachariah Price be guilty of the misdemeanor in the indictment aforesaid above specified, or not guilty, because as well the said Alpheus Gustin, Esq., who prosecutes for the State in this behalf, as the said Zachariah Price, have put themselves upon the said jury, and the jurors of the said jury, by Benjamin Hamilton, Esq., high sheriff of the said County of Sussex, for this purpose empanelled and returned, agreeably to the statute in such case made and provided, to wit, John Cummins, Matthew Ayres, Lewis Havens, Sylvanus Adams, William Milcham, Jacob Miller, Nicholas Ackerson, Gabriel Post, Lewis Peters, Joseph Predmon, Lewis Dennis, and Samuel H. Hibler, who being elected, tried, and sworn and affirmed, the said Lewis Dennis, one of the said jurors, being the only person who was affirmed on the said jury, alleging himself to be conscientiously scrupulous of taking an oath to speak the truth of and concerning the premises, upon their oaths and affirmation, say that the said Zachariah Price is guilty of the misdemeanor aforesaid on him above charged in the form aforesaid, and as by the indictment aforesaid is above supposed against him ; and upon this it is forthwith demanded of the said Zachariah Price if he hath or knoweth of anything to say wherefore the said justice and judges, and their fellows as aforesaid here, ought not upon the premises and verdict aforesaid, to proceed to judgment against him, who nothing further saith, unless as he before had said ; whereupon all and singular the premises being seen, and by the said justice and judges and their fellows as aforesaid, here fully understood, it is considered by the court here that the said Zachariah

Price be confined and imprisoned at hard labor in the State's prison for the term of ten years.

The caption to the panel of the grand jury was as follows:—

List of the names of persons summoned to attend at the Court of Oyer and Terminer and General Gaol Delivery, to be holden at Newton, in and for the County of Sussex in the State of New Jersey, in the term of May, in the year of our Lord one thousand eight hundred and twenty-seven, pursuant to the statute in such case made and provided, by me, viz. A. B., C. D., etc. (naming the jurors).

Subscribed. B. H., *Sheriff*.—(State v. Price, 6 Halst. 204 205, 206.)

City and County of New York, ss.

Be it remembered, That at a Court of General Sessions of the Peace, holden at the Halls of Justice of the City of New York, in and for the City and County of New York, on the first Monday of in the year of our Lord one thousand eight hundred and forty- before Esquire of the said City of New York, and two of the aldermen of the said city, judges of the said court, assigned to keep the peace of the said City and County of New York, and to inquire, by the oaths of good and lawful men of the said county, of all crimes and misdemeanors committed or triable in the said county, and to hear, determine, and punish according to law, all crimes and misdemeanors in the said city and county, done and committed, not punishable with death.

By the oath of foreman (here setting forth grand jurors).

It was presented as follows, that is to say, City and County of New York, ss: The jurors of the people of the State of New York, in and for the body of the City and County of New York, upon their oath present, that, etc.

State of Vermont, Windsor County, ss.

Be it remembered, That at the county court begun and holden at Woodstock, within and for the County of Windsor, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and forty-five: the grand jurors within and for the body of the County of Windsor aforesaid, now here in court duly empanelled and sworn, upon their oath present, that, etc.—(See State v. Nixon, 18 Vt. 70; State v. Munger, 15 Vt. 290.)

CHAPTER II.

GENERAL FRAME OF INDICTMENT AT COMMON LAW.

(2) *Skeleton of indictment generally.*

THE grand jurors for, etc.,^(a) inquiring for, etc.,^(b) upon their oaths (or oaths and affirmations),^(c) do present, that A. B.,^(d) late of the said county,^(e) yeoman,^(f) on the ^(g) with force and arms,^(h) at aforesaid, in the county aforesaid,⁽ⁱ⁾ and within the jurisdiction of the said court, in and upon, etc., one E. F., etc.,^(j) against the form of the statute (*or statutes*) in such case made and provided, and against the peace and dignity (*of the sovereign authority*).^(k)

2d Count. And the jurors aforesaid, upon their oaths (or oaths and affirmations) aforesaid, do further present, that the said A. B. aforesaid, to wit, on the day and year aforesaid, at in the county and within the jurisdiction aforesaid, did, etc.^(l)

(*Conclude as in first count.*)

(a) It must appear in the commencement of each count of an indictment that it was found by the jurors of the particular jurisdiction, on their oaths or affirmations. 2 Hale, 167; 2 Hawk. c. 25, s. 126; Burns, J., *Indictment*, ix.; *State v. Conley*, 39 Me. 78; *State v. Nixon*, 18 Vt. 70; *Com. v. Fisher*, 7 Gray, 492; *Young v. State*, 6 Ohio, 435; *Burgess v. Com.*, 2 Va. Cas. 483; *Clark v. State*, 1 Carter, Ind. 253; *State v. Williams*, 2 McCord, 301; *Morgan v. State*, 19 Ala. 556; *Byrd v. State*, 1 How. (Miss.) 163; *Abram v. State*, 25 Miss. 589. As to inserting "good and lawful men," see *Weinzorpfen v. State*, 7 Blackf. 186. The usual form is, "The grand jurors for the State (or Commonwealth) of A., inquiring for the city (or town) of B., upon their oaths and affirmations respectively do present." To this, as a title, is prefixed the statutory name of the court. "Oath" may supply the place of "oaths." *State v. Dayton*, 3 Zab. 49; *Jerry v. State*, 1 Blackf. 395. That the *commencement* may be amended see *Com. v. Colton*, 11 Gray, 1; *State v. Mathis*, 21 Ind. 277; *State v. England*, 19 Mo. 481. The want of such allegation in a subsequent count will not be aided by such allegations in a former count, where there is no reference to such former count for the finding of that fact. *R. v. Waverton*, 17 Q. B. 562; 2 Den. C. C. 347; *State v. McAlister*, 26 Me. 374. It is not necessary that the commencement should use the term "grand" before jurors, when the rest of the record shows that it was "grand jurors" that was meant. *U. S. v. Williams*, 1 Cliff. C. C. 5; *Com. v. Edwards*, 4 Gray, 1; *State v. Pearce*, 14 Fla. 153.

The jurors "of" instead of "for" is not bad on arrest of judgment. *R. v. Turner*, 2 M. & Rob. 214, Parke, J.; see 1 Chit. C. L. 327.

(b) At common law the jurors must appear to be of the county. *Whitehead v. R.*, 14 Law J. (M. C.) 165; see *infra*, 3, 4, 5, *et seq.*, for the forms and authorities in the several States.

(c) Where the jurors entertain conscientious objections to taking an oath, the proper course is to insert "oaths and affirmations" (*Dickinson's Q. S.* 200; *Key's case*, 9 C. & P. 78); and this is always the case in Pennsylvania, though in other states the practice has been relaxed, and the phrase "oath" seems adopted as a settled form. And it is enough to state simply "oath and affirmation," without giving reasons why any of the jurors were affirmed instead of being sworn. *Com. v. Brady*, 7 Gray, 320. *Supra*, p. 5; though see *State v. Harris*, 2 Halst. 457.

(d) The indictment must be certain as to the defendant's name. *Bac. Abr. Misn. B.*; 2 Hale, 175; *Chitty's C. L.* 167; *Enwright v. State*, 58 Ind. 567. The name should be repeated to every distinct allegation; but it will suffice to mention it once as the nominative case in one continuing sentence.

When once given in full, the name need only be repeated by the Christian title as "the said John" or "James," as the case may be. *State v. Pike*, 65 Me. 111. But each count must describe the defendant by his full name. *R. v. Waters*, 1 Den. C. C. 356; *Com. v. Sullivan*, 6 Gray, 478. An indictment against "Edward Toney Joseph Scott," laborers, intended for Edward Toney and Joseph Scott, is bad. *State v. Toney*, 13 Tex. 74.

If the surname of the defendant be omitted in the presenting portion of an indictment, the defect is fatal, though the full name be mentioned in subsequent allegations referring to the name as their antecedent. *State v. Hand*, 1 Eng. (Ark.) 165.

A plea in abatement will be maintained when the Christian name of the defendant is mistaken. 2 Hale, 176, 237, 238; 2 Hawk. c. 25, s. 68; *Bac. Ab. Ind. G.* 2, *Misn. B.*; *Burn, J., Indict.*; *Gilb. C. P.* 217; *Com. v. Demain*, *Brightly R.* 441. A mistake as to the surname is now held equally fatal. 10 East, 83; *Kel.* 11, 12. After verdict the objection is too late. *Wh. Cr. Pl. & Pr.* §§ 106, 423; *State v. Bishop*, 15 Me. 122; *State v. Nelson*, 29 Me. 329; *Smith v. Bowker*, 1 Mass. 76; *Com. v. Lewis*, 1 Met. 151; *Com. v. Fredericks*, 119 Mass. 199; *Com. v. Cherry*, 2 Va. Cas. 20; *State v. White*, 32 Iowa, 17; *Miller v. State*, 54 Ala. 155; *Foster v. State*, 1 Tex. Ap. 531.

Misspelling does not vitiate if the sound of the name is not affected. 10 East, 84; 16 East, 110; 2 Hawkins, c. 27, s. 81; *Wh. Cr. Pl. & Pr.* § 119; *Wh. Cr. Ev.* §§ 94 *et seq.* If two names are, in original derivation, the same, and are taken promiscuously in common use though they differ in sound, there is held to be no variance. 2 Rol. Ab. 135; *Bac. Ab. Misn.*, where the instances of this principle are stated at large.

A blank in either Christian name or surname is ground for a motion to quash, or plea in abatement. *Wh. Cr. Pl. and Pr.* §§ 385, 425.

The surname may be such as the defendant has usually gone by or acknowledged; and if there be a doubt which one of two names is his real surname, the second may be added in the indictment after an *alias dictus*. *Bro. Misn.* 37. Proof of either will be enough. *State v. Graham*, 15 Rich. (S. C.) 310.

It was once doubted whether there could be an *alias* of the Christian name. 1 *Ld. Raym.* 562; *Willes*, 554; *Burn, J., Indict.*; 3 East, 111. This doctrine, Mr. Chitty well argues, is not well founded; for, admitting that a person cannot have two Christian names at the same time, yet he may be called by two such names, which is sufficient to support a declaration or indictment, baptism being immaterial. *R. T. H.* 26; 6 *Mod.* 116; 1 *Camp.* 479. And Lord Ellenborough said that for all he knew, on a demurrer, "Jonathan, otherwise John," might be all one Christian name. *Scott v. Soans*, 3 East, 111.

The inhabitants of a parish, in England, may be indicted for not repairing a highway, or the inhabitants of a county, for not repairing a bridge, without naming any of them. 2 *Roll. Abr.* 79. And for all disobedience to statutes and derelictions of duty, the better opinion is that a corporation aggregate may be indicted by its corporate name; which name must, as a rule, be correctly alleged

as it existed at the time of the offence. Wh. Cr. L. 8th ed. §§ 91-2; *R. v. Great North of England R. R. Co.*, 9 Q. B. 315; *R. v. Mayor, etc., of Manchester*, 7 El. & Bl. 453; *R. v. Birm. & Glou. Railway Co.*, 3 Ad. & El. 223; 9 C. & P. 478; *State v. Vermont C. R. R.*, 28 Vt. 583; *Com. v. Philippsburg*, 10 Mass. 78; *Com. v. Dedham*, 16 Ibid. 142; *Com. v. Demuth*, 12 S. & R. 389. But see *State v. Great Works*, 20 Me. 41; *McGary v. People*, 45 N. Y. 153; *Com. v. Turnpike Co.*, 2 Va. Cas. 362.

In several jurisdictions it has been determined that the law does not recognize more than one Christian name, and, therefore, when the middle names of the defendant are omitted, the omission is right. *R. v. Newman*, 1 Ld. Raym. 562; *Roosevelt v. Gardiner*, 2 Cow. 463; *People v. Cook*, 14 Barb. 259; *Edmondson v. State*, 17 Ala. 179; *State v. Manning*, 14 Texas, 402; *State v. Williams*, 20 Iowa, 98. See *State v. Smith*, 7 Eng. 622; *West v. State*, 48 Ind. 483; *State v. Martin*, 10 Mo. 391. The averment, if made, must be proved. *Price v. State*, 19 Oh. 423; *State v. Hughes*, 1 Swan (Tenn.), 261; *State v. Webster*, 30 Ark. 166; but see *contra*, *People v. Lockwood*, 6 Cal. 205; *Miller v. People*, 39 Ill. 457. It was held a misnomer, however, when T. H. P. was indicted by the name of T. P.; he being generally known as T. H. P. *Com. v. Perkins*, 1 Pick. 388. See, to same effect, *State v. Homer*, 40 Me. 438; *Com. v. Halt*, 3 Pick. 362. The omission of the first name, giving only the middle, is fatal, unless the party is only known by the middle name. *State v. Hughes*, 1 Swan, 266; *State v. Martin*, 10 Mo. 391. See *Hardin v. State*, 26 Tex. 113. The true view is that when a party is known by a combination of names, by these he should be described; though it is otherwise when he is only known by a single name. Wh. Cr. Ev. § 100. Where names are ordinarily written with an abbreviation, this will be sufficient in an indictment. *State v. Kean*, 10 N. H. 347. See *Com. v. Kelcher*, 3 Metc. (Ky.) 484; *Gatty v. Field*, 9 Ad. & El. (N. S.) 431. And where a man is in the habit of using initials for his Christian name, and he is so indicted, and the fact whether he was so known is put in issue, and he is convicted, the court will not interfere on that ground. *R. v. Dale*, 17 Q. B. 64; *Tweedy v. Jarvis*, 27 Conn. 42; *Vandermark v. People*, 47 Ill. 122; *City Coun. v. King*, 4 McCord, 487; *State v. Anderson*, 3 Rich. 172; *State v. Bell*, 65 N. C. 313; *State v. Johnson*, 67 N. C. 58; *State v. Black*, 31 Tex. 560.

"Lord Campbell, when an objection was made to a recognizance taken before L. B. Townshend, Esq., and I. H. Harper, Esq., that only the initials of the Christian names of the justices were mentioned, remarked: 'I do not know that these are initials; I do not know that they (the justices) were not baptized with those names; and I must say that I cannot acquiesce in the distinction that was made in *Lomax v. Tandels*, that a vowel may be a name but a consonant cannot. I allow that a vowel may be a Christian name, and why may not a consonant? Why might not the parents, for a reason good or bad, say that their child should be baptized by the name of B., C., D., F., or H.? I am just informed, by a person of most credible authority, that within his own knowledge a person has been baptized by the name of T.' And in this opinion of the chief, Justices Patterson, Wightman, and Erle concurred. *R. v. Dale*, 15 Jur. 657; 5 E. L. & E. 360." 18 Alb. L. J. 127; S. P., *Tweedy v. Jarvis*, 27 Conn. 42.

But in *Kinnersley v. Knott*, 7 C. B. 980, Mr Sergeant Talfourd contended that a defendant called "John M. Knott" was not legally and properly designated, saying that the letter M, standing by itself, could not be pronounced and meant nothing, but that in this connection it meant something, and that that something ought to be stated, for the law forbade the use of initials in pleadings. The court held that M was not a name. Maule, J., said, that vowels might be names, and that in Sully's Memoirs a Monsieur D'O is spoken of; but that consonants could not be so alone, as they require in pronunciation the aid of vowels; and the chief justice said that the courts had decided that they would not assume that a consonant expresses a name, but that it stood for an initial only, and that the insertion of an initial instead of a name was a ground of demurrer.

In this country single consonants may be names. 18 Alb. L. J. 127. See *Mead v. State*, 26 Oh. St. 505; *State v. Brite*, 73 N. C. 26.

In *Gerrish v. State*, 53 Ala. 476, the defendant was indicted by the name of F. A. Gerrish, and he pleaded that his name was not F. A. Gerrish, but Frank Augustus Gerrish, and that he was generally known as Frank A. Gerrish, and that this was known to the grand jury that indicted him. The plea was held good.

A motion to quash will be refused when based simply on the adoption of initials for Christian names. *U. S. v. Winter*, 13 Blatch. 276.

Unknown.—Where the name of the defendant is unknown, and he refuses to disclose it, he may be described as a person whose name is to the jurors unknown, but who is personally brought before them by the keeper of the prison. *State v. Angell*, 7 Fredell, 27. An indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury meant to designate, will be insufficient. *R. v. —*, R. & R. 489. The practice is to indict the defendant by a specific name, such as John No-name, and if he pleads in abatement, to send in a new bill, inserting the real name which he then discloses, by which he is bound. This course is in some States prescribed by statute. See *Geiger v. State*, 5 Iowa, 484.

A known party cannot be indicted as unknown. Wh. Cr. Pl. & Pr. § 211; Wh. Cr. Ev. 8th ed. § 97; *Geiger v. State*, 5 Iowa, 484. See, as to Christian name, *Stone v. State*, 30 Ind. 115; *Wilcox v. State*, 31 Tex. 586.

The *Christian* name may, if necessary, be averred to be unknown. *Kelley v. State*, 25 Ark. 392; *Bryant v. State*, 36 Ala. 270; *Smith v. Bayonne*, 23 La. An. 78.

As to pleading unknown co-conspirators see Wh. Cr. L. 8th ed. § 1393.

Junior and Senior.—The old rule was that when a father and son of the same name lived in the same community, they should be distinguished as "Senior" and "Junior." 1 Bulst. 183; 2 Hawk. c. 25, s. 70; Salk. 7. This, however, is not now requisite in cases where a party is not known by a designation of this class. *Hodgson's case*, 1 Lewin C. C. 236; *Peace's case*, 3 Barn. & Ald. 579; *State v. Grant*, 22 Me. 171; *State v. Weare*, 38 N. H. 314; *Allen v. Taylor*, 26 Vt. 599; *Com. v. Perkins*, 1 Pick. 388; *Com. v. Parmenter*, 101 Mass. 211; *People v. Cook*, 14 Barb. 259; *People v. Collins*, 7 Johns. 549; *McKay v. State*, 8 Tex. 376. See *Coit v. Starkweather*, 8 Conn. 289; *Com. v. East Boston Ferry Co.*, 13 Allen, 589; *State v. Vittum*, 9 N. H. 519; *R. v. Bailey*, 7 C. & P. 264; *R. v. Peace*, 3 Barn. & Ald. 579; *Jackson ex dem Pell v. Provost*, 2 Caines, 165. In *Com. v. Parmenter*, 101 Mass. 211, it was held that "W. R., Jr.," might be indicted as "W. R.," the second of that name. The question is one of usage. If a party is commonly known as "Junior" or as "2d," as such he must be indicted; otherwise not. Wh. Cr. Ev. § 100.

(e) *Residence*.—The defendant must be described as of the town or hamlet, or place and county, of which he was or is, or in which he is or was, conversant. Archbold's C. P. 27. In most States, the forms in common use give the addition of place, as "late of the same county," or "of the county of —." The place may be averred to be that of the commission of the crime. *Com. v. Taylor*, 113 Mass. 1.

Addition.—Stat. 1 Henry 5, c. 5, in force in several states, specifies the following additions: "Estate, or degree, or mystery;" and also the addition of the "towns, or hamlets, or places, and counties of which they were or be, or in which they be or were conversant." See, as to Pennsylvania, Roberts's Dig. 2d ed. 374. The construction given to the statute in England has been, that the words "estate or degree" have the same signification, and include the titles, dignities, trades, and professions of all ranks and descriptions of men. 2 Inst. 666. This statute is in force in Pennsylvania. *Com. v. France*, 3 Brewster, 148. The omission of the addition is at common law fatal. *State v. Hughes*, 2 Har. & McH. 479; *Com. v. Sims*, 2 Va. Cases, 374. As to Indiana see *State v.*

McDowell, 6 Blackf. 49. In most jurisdictions additions are no longer necessary. Mystery means the defendant's trade or occupation; such as merchant, mercer, tailor, schoolmaster, husbandman, laborer, or the like. 2 Hawk. c. 33, s. 111. Where a man has two trades, he may be named of either. 2 Inst. 658. But if a man who is a "gentleman" in England be a tradesman, he should be named by the addition of gentleman. 2 Inst. 669. In all other cases he may be indicted by his addition of degree or mystery, at the option of his prosecutor. See *Mason v. Bushel*, 8 Mod. 51, 52; *Horspoole v. Harrison*, 1 Str. 556; *Smith v. Mason*, 2 Str. 816; 2 Ld. Raym. 1541.

(f) Though, when there is no addition, the correct course at common law is to quash, yet, when there is a misnomer, the only method of meeting the error is by plea in abatement. *State v. Bishop*, 15 Me. 122; *State v. Nelson*, 29 Me. 329; *Smith v. Bowker*, 1 Mass. 76; *Com. v. Lewis*, 1 Met. 151; *Com. v. Demain*, Brightly R. 441; *Lynes v. State*, 5 Port. 236; *Com. v. Cherry*, 2 Va. Cas. 20; *State v. White*, 32 Iowa, 17. Wh. Cr. Pl. & Pr. §§ 385, 423. The error, however, must be one of substance; hence a plea in abatement that James Baker is a husbandman, and not a laborer, being demurred to, was adjudged bad. *Haught v. Com.*, 2 Va. Cas. 3. See, however, *Com. v. Sims*, 2 Va. Cas. 374.

In ordinary cases it is sufficient to give the additions of yeoman or laborer. 8 Mod. 51, 52; 1 Str. 556; 2 Str. 816; 2 Ld. Raym. 1541. To tradesmen may be given the addition of their trade; to widows, the addition of widows; to single women, the addition of spinster or single woman; to married women, usually thus: "Jane, the wife of John Wilson, late of the parish of C., in the county of B., laborer," though "matron" is not fatal. *State v. Nelson*, 29 Me. 329. Laborer (*R. v. Franklyn*, 2 Ld. Raym. 1179), or yeoman (2 Inst. 668), is not a good addition for a woman. Servant is not a good addition in any case. *R. v. Checkets*, 6 M. & S. 88.

Any addition calculated to cast contempt or ridicule on the defendant is bad; and it has been held, in Maine, that the addition "lottery vender," when the defendant was, in fact, a lottery broker, is bad on abatement. *State v. Bishop*, 15 Me. 122.

Where, in an indictment against a woman, she is described as A. B., "wife of C. D.," these latter words are held to be mere additions, or *descriptio personae*, and need not be proved on trial. *Com. v. Lewis*, 1 Met. 151.

(g) Time and place must be attached to every material fact averred. 1 Chit. on Pleading, 4th ed., Index, tit. Time; *R. v. Holland*, 5 T. R. 607; *R. v. Aylett*, 1 T. R. 69; *Stand. 95 a*; *R. v. Haynes*, 4 M. & S. 214; *State v. Baker*, 4 Reding. 52; *State v. Hanson*, 39 Me. 337; *Crichton v. People*, 6 Park. C. R. 363; *Roberts v. State*, 19 Ala. 526; *State v. Walker*, 14 Mo. 398; *State v. Beckwith*, 1 Stewart, 318; *Sanders v. State*, 26 Tex. 119; *State v. Slack*, 30 Tex. 354; *People v. Littlefield*, 5 Cal. 355; though see *State v. Barnett*, 3 Kans. 250. The time, however, of committing the offence (except where the time enters into the nature of the offence) may be laid on any day previous to the finding of the bill, during the period within which it may be prosecuted. Wh. Cr. Ev. § 102; *U. S. v. Bowman*, 2 Wash. C. C. 328; *Com. v. Dillane*, 1 Gray, 483; *People v. Van Santvoord*, 9 Cow. 660; *Turner v. People*, 33 Mich. 363; *Cook v. State*, 11 Ga. 53; *Wingard v. State*, 13 Ga. 396; *Shelton v. State*, 1 Stew. & Por. 208; *M'Dade v. State*, 20 Ala. 81; *McBryde v. State*, 34 Ga. 202; *State v. Magrath*, 19 Mo. 678.

To assign the day as that of the finding of the bill, or subsequent thereto, is bad. *State v. Munger*, 15 Vt. 291; *State v. Litch*, 33 Vt. 67; *Com. v. Doyle*, 110 Mass. 103; *Jacobs v. Com.*, 5 S. & R. 316; *State v. Noland*, 29 Ind. 212; *Joel v. State*, 28 Tex. 642. Wh. Cr. Pl. & Pr. § 134.

If a day certain be laid before the finding, other insensible dates may be rejected as surplusage. *Wells v. Com.*, 12 Gray, 326; *State v. Woodman*, 3 Hawks, 384; *Cook v. State*, 11 Ga. 53. Wh. Cr. Pl. & Pr. § 125.

Where there is a statute authorizing amendments of formal errors, dates when formal may be amended. *Myers v. Com.*, 79 Penn. St. 308.

Sunday.—The statement of the day of the month, in an indictment for an offence on Sunday, though the doing of the act on that day is the gist of the offence, is not more material than in other cases; and hence, if the indictment charge the offence to have been committed on Sunday, though it names a day of the month which does not fall on Sunday, it is good. *R. v. Trehearne*, 1 Mood. C. C. 298; *Com. v. Harrison*, 11 Gray, 308; *People v. Ball*, 42 Barbour, 324; *State v. Eskridge*, 1 Swan (Tenn.), 413; *State v. Drake*, 64 N. C. 589. But see *Werner v. State*, 51 Ga. 426. For proof see Wh. Cr. Ev. § 106. But “Sunday” or “Sabbath” must be averred, whichever the statute may prescribe. See *R. v. Trehearne*, 1 Mood. C. C. 298; *Com. v. Harrison*, 11 Gray, 308; *McGowan v. Com.*, 2 Metc. (Ky.) 3; *Frazier v. State*, 19 Mo. 678. *Cf. State v. Land*, 42 Ind. 311. And it has been said that “Sabbath” for “Sunday” is no variance. *State v. Drake*, 64 N. C. 589.

A *videlicet* (i. e., “that afterwards, to wit,” etc.) was used by the old pleaders when they wished to aver a date or other fact tentatively, for information, without binding themselves to it as a matter of essential description, a variance in respect to which would be fatal. And the *videlicet* can, if repugnant, be stricken out as surplusage, when there is enough remaining to make out the charge. *Ryalls v. R.* (in error), 11 Q. B. 781; 18 L. J. M. C. 69—Exch. Cham. But see *People v. Jackson*, 3 Denio, 101; and *Mallett v. Stevenson*, 26 Conn. 428; where the *videlicet* was held to narrow the preceding averment. Wh. Cr. Ev. § 141. A *videlicet* relieves the pleader from the necessity of proving a non-essential descriptive averment. 1 Green. Ev. § 60; 1 Ch. Pl. 317; *State v. Heck*, 23 Minn. 551.

After verdict, to support an indictment, and to show that the provisions of a statute have been complied with, dates laid under a *videlicet* may be taken to be true. *R. v. Scott*, D. & B. C. C. 47.

Before verdict, however, and at common law, dates laid in a *videlicet*, when time is material, may be traversed; and hence, if laid insensibly, will vitiate the context. In other words, when an allegation is material, accuracy in stating it cannot be dispensed with by thrusting it into a *videlicet*. See *State v. Phinney*, 32 Me. 440; *Paine v. Fox*, 16 Mass. 129; *State v. Haney*, 1 Hawks, 460; 2 Saund. 291; 1 Ch. C. L. 226.

The month without the year is insufficient. *Com. Dig. Ind. s. 2*; *Com. v. Griffin*, 3 Cush. 523. And so when the month is given but the day is left blank. *Clark v. State*, 34 Ind. 436. If the date be laid in blank the judgment will be arrested. *State v. Beckwith*, 1 Stew. 318; *State v. Roache*, 2 Hayw. 352; *Jane v. State*, 3 Mo. 45; see *Com. v. Hutton*, 5 Gray, 89; *Jacobs v. Com.*, 5 S. & R. 315; *Simmons v. Commonwealth*, 1 Rawle, 142; *State v. Hopkins*, 7 Blackf. 494.

It is ruled that A. D., in initials, will be sufficient where a reference to the Christian era is required. *State v. Reed*, 35 Me. 489; *State v. Hodgeden*, 3 Vt. 481. But the better opinion is that “*anno domini*,” “A. D.,” and “in the year of our Lord,” may be dispensed with. *Broome v. R.*, 12 Q. B. 834; *State v. Gilbert*, 13 Vt. 647; *State v. Haddock*, 2 Hawks, 461; *State v. Dickens*, 1 Hayw. 406; *Hall v. State*, 3 Kelly, 18; *Engleman v. State*, 2 Carter (Ind.), 91; *State v. Munch*, 22 Minn. 67; though see *Whitesides v. People*, 1 Breese, 4. The dates may be given in Arabic figures. Wh. Cr. Pl. & Pr. § 274; *State v. Reed*, 35 Me. 489; *State v. Hodgeden*, 3 Vt. 481; *State v. Jericho*, 40 Vt. 121; *Com. v. Hagarman*, 10 Allen, 401; *Com. v. Adams*, 1 Gray, 48; *Lazier v. Com.*, 10 Grat. 798; *Cady v. Com.*, 10 Grat. 776; *State v. Dickens*, 1 Hayw. 406; *State v. Haddock*, 2 Hawks, 461; *State v. Lane*, 4 Ired. 113; *State v. Raiford*, 7 Port. 101; *State v. Smith*, Peck, 165; *State v. Egan*, 10 La. An. 699; *Kelly v. State*, 3 S. & M. 518; *State v. Seamons*, 1 Iowa, 418; though see *contra*, at common law in New Jersey and Indiana, *Berrian v. State*, 2 Zabriskie, 9; *State v. Voshall*, 4 Ind. 590; *Finch v. State*, 6 Blackf. 533. In both States this is corrected by statute. *Johnson v. State*, 2 Dutch. (N. J.) 133. So also as to Indiana, *Hizer v. State*, 12 Ind. 330. It should be averred

which figures designate the year. It is not enough to say "the fifteenth of June 1855." *Com. v. McLoon*, 5 Gray, 91.

To aver that the defendant, on divers days, committed an offence, is bad; and so where two distinct days are averred. 1 *Ld. Raym.* 581; 10 *Mod.* 249; 2 *Hawk. c.* 25, s. 82; *Cro. C. C.* 36; 4 *Mod.* 101; *Com. v. Adams*, 1 Gray, 481; *State v. Brown*, 3 *Murph.* 224; *State v. Weller*, 3 *Murph.* 229; *State v. Hayes*, 24 *Mo.* 358, corrected by statute, 1852, p. 368; *Hampton v. State*, 8 *Ind.* 336; *State v. Hendricks*, *Conf.* 369. *Aliter* under N. Y. statute. *New York v. Mason*, 4 *E. D. Smith*, 142. To aver a series of blows on successive days, resulting in death, is not bad. *Com. v. Stafford*, 12 *Cush.* 619. It is sufficient to state that on a day specified, as well as on certain other days, the defendant kept a gaming-house, a tippling-house, or a common nuisance; the allegation, "certain other days," being rejected as surplusage. *Starkie's C. P.* 60; *U. S. v. La Costa*, 2 *Mason*, 129; *State v. Cofren*, 48 *Me.* 365; *Com. v. Pray*, 13 *Pick.* 359; *Wells v. Com.*, 12 *Gray*, 326; *People v. Adams*, 17 *Wend.* 475; *State v. Jasper*, 4 *Dev.* 323; *State v. May*, 4 *Dev.* 328; *Cook v. State*, 11 *Ga.* 53.

Continuando.—When a *continuando* is to be averred (*e. g.*, in cases of continuous bigamy or continuous nuisance), the periods between which the offence is charged to continue should be specified. See 2 *Hawk. P. C. c.* 25, s. 62; *U. S. v. Fox*, 1 *Low.* 301; *U. S. v. La Costa*, 2 *Mason*, 140; *State v. Munger*, 15 *Vt.* 290; *State v. Temple*, 38 *Vt.* 37; *Wells v. Com.*, 12 *Gray*, 326; *Com. v. Tower*, 8 *Met.* 527; *Com. v. Travers*, 11 *Allen*, 260; *People v. Adams*, 17 *Wend.* 475. The limit may be fixed at the day of finding the bill. *Com. v. Stone*, 3 *Gray*, 453; but see *Com. v. Adams*, 4 *Gray*, 27.

Without the allegation of a *continuando*, or a tantamount allegation of continuance, there can, on indictments for nuisance, be no abatement. *Wh. Cr. L.* 8th ed. § 1426; *R. v. Stead*, 8 *T. R.* 142.

An allegation that the offence therein charged was committed on a certain specified "day of September *now passed*," is not stated with sufficient certainty; *Com. v. Griffin*, 3 *Cush.* 523.

It has been said that the words "on or about" a particular day may be treated as mere surplusage. *State v. Tuller*, 34 *Conn.* 280; *Hampton v. State*, 8 *Ind.* 336. This, however, cannot be accepted at common law. *U. S. v. Crittenden*, *Hemp.* 61; *U. S. v. Winslow*, 3 *Sawyer*, 337; *State v. O'Keefe*, 41 *Vt.* 691; *State v. Land*, 42 *Ind.* 311; *Effinger v. State*, 47 *Ind.* 256; *Barnhouse v. State*, 31 *Oh. St.* 39; *Morgan v. State*, 13 *Florida*, 671.

It is incorrect to lay the offence between two days specified. 1 *Ld. Raym.* 581; 10 *Mod.* 249; 2 *Hawk. c.* 25, s. 82; *Cro. C. C.* 36; *Burn, J.*, *Indict.*; *Williams, J.*, *Indict.* iv.; 1 *Chitty, C. L.* 216; *State v. Temple*, 38 *Vt.* 37.

Neglect or non-performance, it has been argued, requires no specification of either time or place. 2 *Hawk. c.* 25, s. 79; *Starkie's C. P.* 61. But see *Archbold's C. P.* 34; *Com. v. Sheffield*, 11 *Cush.* 178. But the proper course is to aver that the defendant, at an assigned time, had a particular duty imposed on him, and that he, at that time, neglected to discharge that duty. See *Wh. Cr. L.* 8th ed. §§ 125, 329, for cases.

The practice is to give the day and year of the Christian era according to the calendar rendering. *Bac. Ab. Indict. G.* 4.

The wrong recital of the date of a statute is immaterial. *People v. Reed*, 47 *Barb.* 235. And such is the case with all erroneous recitals except those of written or printed documents in cases where such documents must be accurately set forth. The *hour* at which an act was done, unless it be required by the statute upon which the indictment is framed, need not be specified. 2 *Hawk. c.* 25, s. 76. And see *Combe v. Pitt*, 3 *Burr.* 1434; *R. v. Clarke*, 1 *Bulst.* 204; 2 *Inst.* 318; *R. v. Davis*, 10 *B. & C.* 89. In burglary, indeed, it is usual to state it; but alleging the offence to have been committed "*in the night*," without mentioning the hour, has been held to be sufficient; *Com. v. Williams*, 2 *Cush.* 582 (under statute); *People v. Burgess*, 35 *Cal.* 115; though at common law

the practice is to aver the hour. 1 Hale, 549; *R. v. Waddington*, 2 East P. C. 513; 2 Hawk. c. 25, ss. 76, 77; *State v. G. S.*, 1 Tyler, 295. And see Wh. Cr. L. 8th ed. § 817; Wh. Cr. Ev. § 106.

When the time has been once named with certainty, it is afterwards sufficient to refer to it by the words *then* and *there*, which have the same effect as if the day and year were actually repeated. 2 Hale, 178; 2 Stra. 901; Keil. 100; 2 Hawk. c. 23, s. 88; c. 25, s. 78; Bac. Ab. Indict. G. 4; Williams, J., Indict. iv.; Comyns, 480; *Stout v. Com.*, 11 S. & R. 177; *State v. Cotton*, 4 Foster, 143; *State v. Bailey*, 21 Mo. 484; *State v. Williams*, 4 Ind. 235; *State v. Reid*, 20 Iowa, 413. The mere conjunction *and* without adding *then* and *there* will be insufficient to make an adequate independent averment. 2 Hale, 173; Dyer, 69; 2 Hawk. c. 23, s. 88; Cro. C. C. 35; 1 East P. C. c. 5, s. 112; Wh. Cr. L. 8th ed. § 529. See *State v. Johnson*, 12 Minn. 476; *State v. Slack*, 30 Tex. 354. Though see *Com. v. Bugbee*, 4 Gray, 206; *Resp. v. Honeyman*, 2 Dall. 228; *State v. Price*, 6 Halst. 210.

If the words "then and there" precede every material allegation, it is sufficient, though these words may not precede the conclusions drawn from the facts. 1 Leach, 529; Dougl. 412; *State v. Johnson*, 1 Walker, Miss. R. 392.

If the indictment allege that the defendant feloniously and of malice aforethought made an assault, and with a certain sword, etc., *then and there* struck, the previous omission will not be material, for the words *feloniously* and *with malice aforethought*, previously connected with the assault, are by the words *then and there* adequately applied to the murder. See 4 Co. 41, b; Dyer, 69, a; 1 East P. C. 346; 1 Ch. C. L. 221; Wh. Cr. L. 8th ed. § 529.

In an indictment for breaking a house with intent to ravish, "then and there" is not necessary to the intent. *Com. v. Doharty*, 10 Cush. 52.

In Massachusetts it is held that an indictment which avers that the defendant, at a time and place named, feloniously assaulted A. B., and, being then and there armed with a dangerous weapon, did actually strike him on his head with said weapon, is sufficient, without repeating the words "then and there" before the words "did actually strike;" the court rejecting the English rule above stated requiring such repetition. *Com. v. Bugbee*, 4 Gray, 206. The same implication exists as to the averment of wounding. *State v. Freeman*, 21 Mo. 481; *State v. Bailey*, 21 Mo. 484. This is established in Indiana by statute. *Thayer v. State*, 11 Ind. 287.

In North Carolina it has been held that an indictment may contain enough to induce the court to proceed to judgment, if the time and place of making the assault be set forth, though they be not repeated as to the final blow. *State v. Cherry*, 3 Murph. 7. See *Jackson v. People*, 18 Ill. 264.

"Then and there" is insufficient where it is necessary to prove, as part of the description of the offence, an act at some specific portion of a day, as where it is necessary to aver the possession of ten or more counterfeit bills *at one time*. *Edwards v. Com.*, 19 Pick. 124.

The word *being* (*existens*), unless necessarily connected with some other matter, is not sufficiently definite. Bac. Ab. Indict. G. 1; Cro. Jac. 639; 2 Lord Raymond, 1467, 1468; 2 Rol. Rep. 225; Com. Dig. Indict. G. 2. It is otherwise when part of an independent adequate averment. *R. v. Boyall*, 2 Burr. 832.

Neither "instantly" (1 Leach, 4th ed. 529; Chitty C. L. 221; *R. v. Brownlow*, 11 A. & E. 119; *Lester v. State*, 9 Mo. 666; *State v. Lakey*, 65 Mo. 217; *State v. Testerman*, 68 Mo. 408. See *Com. v. Ailstock*, 3 Grat. 650; *State v. Cherry*, 3 Murph. 7), nor "immediately" (*R. v. Francis*, Cuning. 275; 2 Strange, 1015), nor "whilst" (*R. v. Pelham*, 8 Q. B. 959), can supply the place of "then and there."

Where the antecedent averment is in any way ambiguous as to time or place, the reference "then and there" is defective. *R. v. Devett*, 8 C. & P. 639; *State v. Jackson*, 39 Me. 291; *Edwards v. Com.* 19 Pick. 124; *Com. v.*

Butterick, 100 Mass. 12; *Com. v. Goldstein*, 114 Mass. 272; *Storrs v. State*, 3 Mo. 9; *Jane v. State*, 3 Mo. 61; *State v. Hayes*, 24 Mo. 358.

If the fact be stated, as to the time or place, with repugnancy or uncertainty, the indictment will be bad. See *Jeffries v. Com.*, 12 Allen, 145; *Com. v. Griffin*, 3 Cush. 523; *People v. Mather*, 10 Mo. 291; *State v. Hendricks*, Con. (N. C.) 369; *Hutchinson v. State*, 62 Ind. 556; *Serpentine v. State*, 1 How. (Miss.) 260; *McMath v. State*, 55 Ga. 303. And an indictment alleging the offence to have been committed on an impossible day (*People v. Mather*, 4 Wend. 229; *Markley v. State*, 10 Mo. 291), or a day subsequent to the finding of the bill (*State v. Munger*, 15 Vt. 291; *State v. Litch*, 33 Vt. 67; *Com. v. Doyle*, 110 Mass. 103; *Penns. v. McKee*, Add. 36; *Jacobs v. Com.*, 5 S. & R. 316; *State v. Noland*, 29 Ind. 212; *State v. Davidson*, 36 Tex. 325; see Wh. Cr. Pl. & Pr. § 120), is defective. But an indictment may be found for a crime committed after the term commenced to which it is returned. *Allen v. State*, 5 Wis. 329.

In perjury and cognate cases, when the time of the alleged false oath enters into the essence of the offence, and is to be shown by the records of the court where the oath was taken, a variance in the day is fatal. Wh. Cr. L. 8th ed. § 103 *a*; *Green v. Rennett*, 1 T. R. 656; *Freeman v. Jacob*, 4 Camp. 209; *Pope v. Foster*, 4 T. R. 590; *Woodford v. Ashley*, 11 East, 508; *Restall v. Stratton*, 1 H. Bl. 49; *U. S. v. McNeal*, 1 Gallis. 387; *U. S. v. Bowman*, 2 Wash. C. C. R. 328; *Com. v. Monahan*, 9 Gray, 119.

Dates of bills of exchange, and other written instruments, must be truly stated when necessarily set out. Wh. Cr. Ev. § 103 *a*; Archbold's C. P. 9th ed. § 90.

Deeds must be pleaded either according to the date they bear, or to the day on which they were delivered. *Ibid*.

Where a time is limited by general statute for preferring an indictment, the time laid should ordinarily appear to be within the time so limited. Wh. Cr. Ev. § 105. See *R. v. Brown*, M. & M. 163; *U. S. v. Winslow*, 3 Sawy. 337; *State v. Hobbs*, 39 Me. 212; *State v. J. P.*, 1 Tyler, 283; *State v. Rust*, 8 Black. 195; *State v. Robinson*, 9 Foster, 274; *Hatwood v. State*, 18 Ind. 492; *People v. Gregory*, 30 Mich. 371; *People v. Miller*, 12 Cal. 291; *McLane v. State*, 4 Ga. 335; *Shelton v. State*, 1 St. & P. 208; *State v. McGrath*, 19 Mo. 678.

(*h*) *Vi et armis*. This allegation (unless in indictments for forcible entry) is no longer essential. Wh. Cr. Pl. & Pr. § 271.

(*i*) As to conflict in cases of venue, see Wh. Cr. L. 8th ed. §§ 269 *et seq.*; and as to whether the venue is to be in the place where the offence was consummated, or in the place where the offender was at the consummation, see, particularly, *Ibid.*, § 284, note. As to change of venue, see Wh. Cr. Pl. & Pr. § 602.

In England, it is now enough to aver the county as the place of the commission. Stat. 6 Geo. 4; 14 & 15 Vict. In the United States, the latter practice is generally accepted wherever the county is coterminous with the jurisdiction of the court. Wh. Cr. Pl. & Pr. § 146; Wh. Cr. Ev. § 107; *People v. Lafuente*, 6 Cal. 202. That "county" is necessary see *People v. Gregory*, 30 Mich. 371. Though it is otherwise when the jurisdiction of the court embraces but a fraction of the county. Wh. Cr. Pl. & Pr. §§ 141-2; 2 Hale, P. C. 166; *McBride v. State*, 10 Humph. 615. So, *mutatis mutandis*, as to towns. *Com. v. Springfield*, 7 Mass. 9.

But as a rule, it is sufficient if the place stated correspond with the jurisdiction of the court. *R. v. Stanbury*, L. & C. 128; *People v. Barrett*, 1 Johnson R. 66; *State v. G. S.*, 1 Tyler, 295; *State v. Jones*, 4 Halsted, 357. This may be "county," "city," or "town," whenever the place described constitutes a distinctive jurisdiction recognized as such by the law.

In several jurisdictions, by statute, when an offence is committed near the boundary line between two counties, it may be averred to be in either county. *People v. Davis*, 56 N. Y. 95; Wh. Cr. L. 8th ed. § 290.

The jurisdiction of the federal courts, where crimes have been committed at sea or abroad, is discussed at large in another work. Wh. Cr. L. 8th ed. §§ 269 *et seq.*

In such cases the trial of the offence is, by Act of April 30, 1790, to be "in the district where the offender is apprehended, *or* into which he may first be brought." For practice see *U. S. v. Arwo*, 19 Wall. 486; *U. S. v. Anderson*, 8 Reporter (1879), 677.

Where an offence is committed within a State by means of an agent, the employer is guilty as a principal, justiciable in such State, though he did not personally act in that State, and at the time the offence was committed was in another State. See *Wh. Cr. L.*, 8th ed. §§ 278 *et seq.*, 282, 284.

Where an offence is committed within the county of A., and after the commission of the offence the county is divided, and the part of the county in which the offence was committed is created a new county called B., the latter county has jurisdiction over the offence. *State v. Jones*, 4 Halst. 357; *Searcy v. State*, 4 Tex. 450. See *U. S. v. Dawson*, 15 How. U. S. 467; *State v. Jackson*, 39 Me. 291; *State v. Fish*, 4 Ired. 219. *Wh. Cr. Pl. & Pr.* § 147. As differing from text see *McElroy v. State*, 13 Ark. 708. In such case, however, the indictment may charge the perpetration in the former county while the trial is in the latter. *Jordan v. State*, 22 Ga. 545; *McElroy v. State*, 13 Ark. 708.

Where there are distinct judicial districts in the county, it is not sufficient that the indictment names the county. *State v. Adams*, 2 Battle's Dig. 729; *Com. v. Springfield*, 7 Mass. 9. And so in all cases where the jurisdiction is less than the county. *Taylor v. Com.* 2 Va. Cas. 94; *McBride v. State*, 10 Humph. 615.

The court will take judicial notice of statutory subdivisions of counties. *Ibid.*; *Com. v. Springfield*, 7 Mass. 9; *State v. Powers*, 25 Conn. 48. But it is said that averring a place to be at "W.," and not at the "city" or "town" of "W.," is not enough. *Com. v. Barnard*, 6 Gray, 488. See, however, *Tower v. Com.*, 111 Mass. 117, where it was held that it was enough, in error, to aver the town; the court taking notice that the town was in a particular county. Compare comments in *Heard's Pleading*, 81.

Where the caption gives the name of the State, it need not be repeated in the indictment. *Com. v. Quin*, 5 Gray, 478. And, generally, as the name of the State is assumed, in all the proceedings, it need not be given in the indictment. *State v. Wentworth*, 37 N. H. 196; *State v. Lane*, 4 Ired. 113.

Of *transitory* offences, as they are called (*e. g.* offences of which the object of the offence is not necessarily attached to a particular spot), a variance as to specification of place is not fatal if jurisdiction be correctly given. In the city of New York, the practice is to charge the ward as part of the venue: thus: "In the First Ward of the city of New York;" in New Orleans, to name the parish. The same practice obtains elsewhere. If, however, the offence is shown to be within the jurisdiction of the court, the special place averred, if unessential, need not, when the offence is transitory, be proved. 2 Hale, 179, 244, 245; 4 Bla. Com. 306; 2 Hawk. c. 25, s. 84; c. 46, ss. 181, 182; 1 East P. C. 125; Holt, 534; *R. v. Woodward*, 1 Mood. C. C. 323; *Com. v. Gillon*, 2 Allen, 502; *Carlisle v. State*, 32 Ind. 55; *Heikes v. Com.*, 26 Penn. St. 531; *Wh. Cr. Ev.* § 109.

But where the case is stated by way of local description and not as a venue merely, a variance in what are called *local* offences (*e. g.* where the object is necessarily attached to a place) is fatal. *R. v. St. John*, 9 C. & P. 40; *R. v. Redley*, R. & M. 515; *State v. Cotton*, 4 Foster (N. H.), 143; *People v. Slater*, 5 Hill N. Y. R. 401; *Moore v. State*, 12 Ohio St. 387; *State v. Crogan*, 8 Iowa, 523; *Norris v. State*, 3 Greene, Iowa, 513; *Chute v. State*, 19 Minn. 271; *Grimme v. Com.*, 5 B. Mon. 263; *Wh. Cr. Ev.* § 109. Under the same head are to be included injuries to machinery permanently fixed, and buildings; *R. v. Richards*, 1 M. & R. 177; nuisances, when emanating from local sites; *Com. v. Heffron*, 102 Mass. 148; and houses of ill-fame; *State v. Nixon*, 18 Vt. 70. Such specifications, though unnecessary, must be proved. *Wh. Cr. Ev.* § 109.

It is sufficient if the place be averred simply as "the county aforesaid," when the county is named in the caption, or in the commencement, for which the grand jurors were sworn. *Com. v. Edwards*, 4 Gray, 1; *State v. Smith*, 5 Harring.

490; *Wingard v. State*, 13 Ga. 396; *State v. Ames*, 10 Mo. 743; *State v. Simon*, 50 Mo. 370; *State v. Shull*, 3 Head (Tenn.), 42; *Evarts v. State*, 48 Ind. 422; *Noe v. People*, 39 Ill. 96. See, to same effect, *State v. Baker*, 50 Me. 45; *State v. Roberts*, 26 Me. 263; *State v. Conley*, 39 Me. 78; *Haskins v. People*, 16 N. Y. 344; *State v. Lamont*, 3 Hawks, 175; *State v. Bell*, 3 Ired. 506; *State v. Tolever*, 5 Ired. 452. Compare 1 Wms. Saund. 308. It is otherwise when two counties are previously named. *State v. McCracken*, 20 Mo. 411.

Even "county" may be left out in the statement of place, when it can be presumed from prior averments. See *Com. v. Cummings*, 6 Gray, 487. *State v. Walter*, 14 Kans. 375. Where it was alleged that the defendant broke and entered "the city hall of the city of Charlestown;" this was held a sufficient averment that the property of the building alleged to be broken and entered is in the city of Charlestown. *Com. v. Williams*, 2 Cush. 583.

"County" or "town" or "city," however, must somewhere appear; and it is not enough to aver the offence to have been committed in *C*. The indictment must say, either directly or by reference to the caption, that *C* is a town or city or county. *Com. v. Barnard*, 6 Gray, 488. Wh. Cr. Pl. & Pr. § 142.

But an indictment for burning a barn situate at a certain place, which was within the jurisdiction of the court, and alleged to be "within the curtilage of the dwelling-house of A.," need not also aver that the dwelling-house was at that place. *Commonwealth v. Barney*, 10 Cush. 480.

The effect of "then and there" has been already considered in the note to the allegation of time.

A change of local title, when enacted by the legislature, must be followed by the pleader. *State v. Fish*, 4 Ired. 219; and authorities on prior page. It has, however, been held not error to describe a county within which the offence was committed by the name belonging to it at the time of trial, even though it went by another name at the time when the act was committed. *McElroy v. State*, 8 Eng. (13 Ark.) 708; and see *Jordan v. State*, 22 Ga. 545.

Where a fine is payable, or penalty is special, to a subdivision of county, it has been said that the pleading should aver such subdivision, so as to guide the court in the application of the fine or penalty; *Botto v. State*, 26 Miss. 108. See *Legori v. State*, 8 Sm. & M. 697; *State v. Smith*, 5 Harring. 490, and cases cited supra; though this has been doubted in cases where the court can ascertain the place of the defendant's residence otherwise than by the verdict of the jury. *Duncan v. Com.*, 4 S. & R. 449.

In larceny, the venue may be laid in any county in which the thief was possessed of the stolen goods. See Wh. Cr. L. 8th ed. §§ 391, 930; and see *R. v. Peel*, 9 Cox C. C. 220; Wh. Cr. Ev. § 111.

Where an indictment omits to lay a venue of the offence charged, it is a fatal defect, on motion to quash, or in arrest of judgment. Wh. Cr. Pl. & Pr. § 385; *Thompson v. State*, 51 Miss. 353; *Searcy v. State*, 4 Tex. 450; *Morgan v. State*, 13 Flor. 671.

In another work the proof of place is discussed at large; and it is shown that the place of the offence must be proved to be within the jurisdiction of the court (Wh. Cr. Ev. § 107), though the proof of this is inferential. *Ibid.* § 108. It will also be seen that when a place is stated as matter of description, a variance may be fatal. *Ibid.* § 109. The venue in homicide may be placed by statute in the place of death (*Ibid.* § 110; see Wh. Cr. L. 8th ed. § 292); and that of conspiracy in the place of any overt act. Wh. Cr. Ev. § 111; Wh. Cr. L. 8th ed. § 1397; Inf. 607, note.

(j) The statute of additions extends to the defendant alone, and does not at all affect the description either of the prosecutor, or any other individuals whom it may be necessary to name. 2 Leach, 861; 2 Hale, 182; *Burn, J.*, Indictment; Bac. Ab. Indictment, G. 2; *R. v. Graham*, 2 Leach, 547; *R. v. Ogilvie*, 2 C. & P. 230; *Com. v. Varney*, 10 Cush. 402; though see *R. v. Deeley*, 1 Mood. C. C. 303. The name thus given must be the name by which the person is generally known. Wh. Cr. Pl. & Pr. §§ 116, 119; *R. v. Norton*, Rus. & Ry.

510; *R. v. Berriman*, 5 C. & P. 601; *R. v. Williams*, 7 C. & P. 298; *State v. Haddock*, 2 Hayw. 162; *Walters v. People*, 6 Park. C. R. 16. Christian as well as surname must, if known, be given. *Morningstar v. State*, 52 Ala. 405; *State v. Taylor*, 15 Kans. 420; *Collins v. State*, 43 Tex. 577. When an addition is stated descriptively, a variance may be fatal. *R. v. Deeley*, 1 Mood. C. C. 303; 4 C. & P. 579; *Wh. Cr. Ev.* § 100.

When the name of a corporation is given, the corporate title must be strictly pursued, unless specification is made unnecessarily by local statute. *Wh. Cr. L.* 8th ed. § 941; *R. v. Birmingham R. R.*, 3 Q. B. 223; *State v. Vt. R. R.*, 28 Vt. 583; *Fisher v. State*, 40 N. J. L. 169; *McGary v. People*, 45 N. Y. 153; *Lithgow v. State*, 2 Va. Cas. 296; *Smith v. State*, 28 Ind. 321; *Wallace v. People*, 63 Ill. 481.

Whether at common law, in an indictment for stealing the goods of a corporation, it is requisite to aver that the corporation was incorporated, has been much disputed. That it is necessary is ruled in *State v. Mead*, 27 Vt. 722; *Cohen v. People*, 5 Parker C. R. 330; *Wallace v. People*, 63 Ill. 451; *People v. Schwartz*, 32 Cal. 160. That it is unnecessary, unless made so by statute, is ruled in *R. v. Patrick*, 1 Leach, 253; *Com. v. Phillipburg*, 10 Mass. 70; *Com. v. Dedham*, 16 Mass. 141; *People v. McCloskey*, 5 Parker C. C. 57, 334; *People v. Jackson*, 8 Barb. 637; *McLaughlin v. Com.*, 4 Rawle, 464; *Fisher v. State*, 40 N. J. L. 169; *Johnson v. State*, 65 Ind. 204. See *Wh. Cr. L.* 8th ed. § 716. The question depends upon whether the court takes judicial notice of the charter. *Wh. on Ev.* §§ 292-3.

Unknown.—Where a third party is unknown, he may be described as a “certain person to the jurors aforesaid unknown.” 2 Hawk. c. 25, s. 71; 2 East P. C. 651, 781; *Cro. C. C.* 36; *Plowd.* 85, b; *Dyer*, 97, 286; 2 Hale, 181; *Com. v. Tompson*, 2 Cush. 551; *Com. v. Hill*, 11 Cush. 137; *Com. v. Stoddard*, 9 Allen, 280; *Goodrich v. People*, 3 Parker C. R. 622; *Com. v. Sherman*, 13 Allen, 248; *Willis v. People*, 1 Seam. 399; *State v. Irvin*, 5 Blackf. 343; *Brooster v. State*, 15 Ind. 190; *State v. McConkey*, 20 Iowa, 574; *State v. Bryant*, 14 Mo. 340. A Christian name may be averred to be unknown. *Bryant v. State*, 36 Ala. 270; *Smith v. Bayonne*, 23 La. An. 68. An averment of “unknown” will stand, if the party was at the time of the indictment unknown to the grand jury, though he became known afterwards. 2 East P. C. 651; *Stra.* 186, 497; *Com. v. Hendrie*, 2 Gray, 503; *Com. v. Intoxicating Liquors*, 116 Mass. 21. As to vendee in liquor sales, see *Wh. Cr. L.* 8th ed. § 1511; as to deceased persons, see *R. v. Campbell*, 1 Car. & K. 82; *State v. Haddock*, 2 Hayw. 348; *Reed v. State*, 16 Ark. 499; as to owners of stolen property, see 2 East P. C. 651, 781; 1 Ch. C. L. 212; 1 Hale, 181; 2 B. & Ald. 580; *Com. v. Morse*, 14 Mass. 217; *Com. v. Manley*, 12 Pick. 173; *Wh. Cr. L.* 8th ed. § 949. To support the description of “unknown,” remarks Mr. Sergeant Talfourd, “it must appear that the name could not well have been supposed to have been known to the grand jury.” *R. v. Stroud*, 1 C. & K. 187. A bastard is sufficiently identified by showing the name of its parent, thus: “A certain illegitimate male child then lately born of the body of A. B. (the mother).” *R. v. Hogg*, 2 M. & Rob. 380. See *R. v. Hicks*, 2 Ibid. 302, where an indictment for child-murder was held bad for not stating the name of the child, or accounting for its omission. A bastard must not be described by his mother’s name till he has acquired it by reputation. *R. v. Clark*, R. & R. 358; *Wakefield v. Mackey*, 1 Phill. R. 134, *contra*. A bastard child, six weeks old, who was baptized on a Sunday, and down to the following Tuesday had been called by its name of baptism and mother’s surname, was held by Erskine, J., to be properly described by both those names in an indictment for its murder; *R. v. Evans*, 8 C. & P. 765; but where a bastard was baptized “Eliza,” without mentioning any surname at the ceremony, and was afterwards, at three years old, suffocated by the prisoner, an indictment, styling it “*Eliza Waters*,” that being the mother’s surname, was held bad by all the judges, as the deceased had not acquired the name of Waters by reputation. *R. v. Waters*, 1 Mood. C. C. 457; 2 C. & K. 862. (N. B. No

baptismal register, or copy of it, was produced at either trial. *Semb.*: "Eliza" would have sufficed. See *R. v. Stroud*, 1 C. & K. 187, and cases collected; *Williams v. Bryant*, 5 M. & W. 447.) In the previous case of *R. v. Clark, R. & R. 358*, an indictment stated the murder of "*George Lakeman Clark*, a base-born infant male child, aged three weeks," by the prisoner, its mother. The child had been christened *George Lakeman*, being the name of its reputed father, and was called so, and not by any other name known to the witnesses. Its mother called it so. There was no evidence that it had been called by or obtained its mother's name of *Clark*. The court held the name *Clark* incorrect, and as nothing but the name identified the child, the conviction was held bad. See also *R. v. Sheen*, 2 C. & P. 634. However, in *R. v. Bliss*, 8 C. & P. 773, an indictment against a married woman for murder of a legitimate child, which stated "that she, in and upon a certain *infant male child of tender years*, to wit, of the age of six weeks, and not baptized, feloniously and wilfully, etc., did make an assault," etc., was held insufficient by all the judges, as it neither stated the child's name, nor that it was "to the jurors unknown." It is, however, sufficient to describe the child "as a certain male child, etc., of tender age, that is to say, about the age of six weeks, and not baptized, born of the body of C. B." See 2 C. & P. 635, n.; *R. v. Willis*, 1 C. & K. 722; see also *R. v. Sheen*, 2 C. & P. 634; *Dickins*, Q. S. 6th ed. 213.

Junior and Senior.—As to defendants, the law on this point has been already noticed. In England, it is said that where the party injured has a mother or father of the same name, it is better to style the prosecutor "the younger," as it may be presumed that the parent is the party meant; for *George Johnson* means *G. J. the elder*, unless the contrary is expressed. *Singleton v. Johnson*, 9 M. & W. 67. But this was held immaterial when it is sufficiently proved who *Elizabeth Edwards*, the party described assaulted, was, viz., the daughter of another *Elizabeth Edwards*. *R. v. Peace*, 3 B. & Ald. 579. And the question is whether the name specified is that by which the party was accustomed to go.

Where the defendant was indicted for the murder of her bastard child, whose name was to the jurors unknown, and it appeared that the child had not been baptized, but that the mother had said she would like to have it called *Mary Ann*, and little *Mary*, the indictment was held good. *R. v. Smith*, 1 Mood. C. C. 402; 6 C. & P. 151.

An indictment for the murder of "a certain Wyandott Indian, whose name is unknown to the grand jury," is valid, and sufficiently descriptive of the deceased, without an allegation that the words "*Wyandott Indian*" mean a human being. *Reed v. State*, 16 Ark. 499.

If it appear on the trial that the name, alleged to have been unknown, was actually known to the grand jury, the variance is fatal. 2 East P. C. 561, 781; 3 Camp. 265, note; 1 Hale, 512; 2 Hawk. c. 25, s. 71; 2 Leach, 578; *R. v. Robinson*, 1 Holt, 595; *R. v. Stroud*, 2 Mood. 270; *Com. v. Sherman*, 13 Allen, 249; *Com. v. Glover*, 111 Mass. 401; *State v. Wilson*, 30 Conn. 500; *White v. State*, 35 N. Y. 465. See *Buck v. State*, 1 Ohio St. 61; *Blodgett v. State*, 3 Ind. 403; *Jorasco v. State*, 6 Tex. Ap. 283; *Whart. Crim. Ev.* § 97. (As to unknown co-conspirators, see *Wh. Cr. L.* 8th ed. §§ 1393, 1511.) Discovery of the name *subsequently* to the finding of the bill, however, is no ground for acquittal. *Wh. Cr. Ev.* § 97; *R. v. Campbell*, 1 C. & K. 82; *R. v. Smith*, 1 Mood. C. C. 402; *Com. v. Hill*, 11 Cush. 137; *Com. v. Hendrie*, 2 Gray, 503; *Zellers v. State*, 7 Ind. 659; *Cheek v. State*, 38 Ala. 227; *State v. Bryant*, 14 Mo. 340. Nor will it avail in arrest of judgment. *People v. White*, 55 Barb. 606; *S. C.*, 32 N. Y. 465; *Wh. Cr. Ev.* § 97. But the allegation that co-defendants or principals are "unknown" is material, and may be traversed under the plea of not guilty. 3 Camp. 264, 265; 2 East P. C. 781; *Barkman v. State*, 8 Eng. (13 Ark.) 703; *Cameron v. State*, *Ibid.* 712; *Reed v. State*, 16 Ark. 499. See *Wh. Cr. Ev.* § 97; *Wh. Cr. L.* 8th ed. § 948.

It is not enough to defeat the bill, that the same grand jury found another bill, specifying the "person unknown" as "*J. L.*" *R. v. Bush, R. & R.* 372. See

1 Den. C. C. 361; *Com. v. Sherman*, 13 Allen, 250. The burden is on the defendant to prove knowledge at the time by the grand jury. Wh. Cr. Ev. § 97; *Com. v. Hill*, 11 Cush. 137; *Com. v. Gallagher*, 126 Mass. 54. As to liquor cases see Wh. Cr. L. 8th ed. §§ 1510, 1511. Ownership may be laid in one count in persons unknown, and in other counts in several persons tentatively.

If the allegation in which the misnomer appears is material, it may be rejected as surplusage. *Com. v. Hunt*, 4 Pick. 252; *U. S. v. Howard*, 3 Sumner, 12; *State v. Farrow*, 48 Ga. 30; Wh. Cr. Ev. § 138; Wh. Cr. Pl. & Pr. § 158.

An indictment for forgery of a draft addressed to Messrs. Drummond and Company, Charing Cross, by the name of Mr. Drummond, Charing Cross, without stating the names of Mr. Drummond's partners, was held sufficient. 1 Leach, 248; 2 East P. C. 990. But where the pleader undertakes to set out the names of a firm, a variance in the proof of these names is fatal. *Doane v. State*, 25 Ind. 495; Wh. Cr. Ev. §§ 94 *et seq.*

Initials, it seems, are a sufficient designation of the Christian name, if the party uses and is known by such initials. *Mead v. State*, 26 Oh. St. 505; *State v. Bell*, 65 N. C. 313; *State v. Brite*, 73 N. C. 26; *Thompson v. State*, 48 Ala. 165; *State v. Seely*, 30 Ark. 162; *State v. Anderson*, 3 Rich. 172; *State v. Black*, 31 Tex. 560; *Vandermark v. People*, 47 Ill. 122. As to variance see Wh. Cr. Ev. §§ 94 *et seq.* In any view this cannot be excepted to after verdict. *Smith v. State*, 8 Ohio, 294.

A description by a name acquired by reputation has been held sufficiently certain. *R. v. Norton*, R. & R. 509; *R. v. Berriman*, 5 C. & P. 601; *Anon.*, 6 C. & P. 408; *State v. Bundy*, 64 Me. 507; *Waters v. People*, 6 Parker C. R. 16; *Com. v. Trainor*, 123 Mass. 414; *State v. Gardiner*, Wright's Ohio R. 392; *State v. Bell*, 65 N. C. 313; *McBeth v. State*, 50 Miss. 81; Wh. Cr. Ev. § 95.

Should the name proved be *idem sonans* with that stated in the indictment, and different in spelling only, the variance will be immaterial. Wh. Cr. Ev. § 96. See *R. v. Wilson*, 2 C. & K. 527; 1 Den. C. C. 284; 2 Cox C. C. 426; *State v. Bean*, 19 Vt. 530; *Point v. State*, 37 Ala. 148; *State v. Lincoln*, 17 Wis. 579. Thus, Segrave for Seagrave (*Williams v. Ogle*, 2 Str. 889); McLaughlin for McGlofin (*McLaughlin v. State*, 52 Ind. 476); Chambles for Chambless (*Ward v. State*, 28 Ala. 53); Usrey for Userry (*Gresham v. Walker*, 10 Ala. 370); Authron for Autrum (*State v. Scurry*, 3 Rich. 68); Benedetto for Beniditto (*Ahibol v. Beniditto*, 2 Taunt. 401); Whyneard for Winyard, pronounced Winnyard (*R. v. Foster*, R. & R. 412); Petris for Petries, the pronunciation being the same (*Petrie v. Woodworth*, 3 Caines, 219; See *State v. Upton*, 1 Dev. 513); Hutson for Hudson (*State v. Hutson*, 15 Mo. 512), form no variance. But it has been decided that M'Cann and M'Carn (*R. v. Tannett*, R. & R. 351), Shakespear and Shakepear (*R. v. Shakespear*, 10 T. R. 83), Tabart and Tabbart (*Bingham v. Dickie*, 5 Taunt. 814), Shutliff and Shirliff (1 Chit. C. L. 216; 3 Chit. Burn, 341), Comyns and Cummins (*Cruikshank v. Comyns*, 24 Ill. 602), are fatal variances.

What is *idem sonans* is for the jury. *R. v. Davis*, 2 Den. C. C. 231; *T. & M.* 557; 5 Cox C. C. 238; *Com. v. Donovan*, 13 Allen, 571; *Com. v. Jennings*, 121 Mass. 47. See *People v. Cooke*, 6 Park. C. R. 31. See fully Wh. Cr. Ev. §§ 94 *et seq.*

In conclusion, any variance in *sound* in the name of material third parties is fatal at common law, it being the duty of the Court to order an acquittal, though such acquittal is no bar to a second and correct indictment. Wh. Cr. Pl. & Pr. §§ 116, 119.

The court will determine by inspection what is the name as written in the indictment. *O'Neil v. State*, 48 Ga. 66.

Statement of the offence.—It is a general rule that the special matter of the whole offence should be set forth in the indictment with such certainty, that the offence may judicially appear to the court. See *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Simmons*, 96 U. S. 360; *Com. v. Perry*, 114 Mass. 263; *People v. Taylor*, 3 Denio, 91; *Biggs v. People*, 8 Barb. 547; *Kit v. State*, 11 Humph.

167; *State v. Stiles*, 40 Iowa, 148; *State v. Murray*, 41 Iowa, 580. Illustrations are given in Wh. Cr. Pl. & Pr. § 151. When special facts are an essential part of an offence, they must be set out.

Certainty to common intent, it is said, is what is required; perfect certainty is unattainable, and the attempt to secure it would in almost every case lead to a variance. Wh. Cr. Pl. & Pr. § 151; *R. v. Deeley*, 4 C. & P. 579; 1 Mood. C. C. 303.

The certainty, in other words, must be such, so far as concerns the substance of the offence, as exhibits the truth according to its ordinary general acceptance; not the truth with its *differentia* scientifically and exhaustively displayed. See Buller, J., *R. v. Lyme Regis*, 1 Doug. 159.

Where an act is not in itself necessarily unlawful, but becomes so by its peculiar circumstances and relations, all the matters must be set forth in which its illegality consists. 2 Hawk. c. 25, s. 57; Bac. Ab. Indictment, G. 1; Cowp. 683; *People v. Martin*, 52 Cal. 201. Thus an indictment for obstructing an officer in the execution of process, must show that he was an officer of the court out of which the process issued, and the nature of the official duty and of the process. *R. v. Osmer*, 5 East, 304. See *R. v. Everett*, 8 B. & C. 114; *State v. Burt*, 25 Vt. 373; *McQuoid v. People*, 3 Gilman, 76; *Cantrill v. People*, *Ibid.* 356. An indictment, also, for contemptuous or disrespectful words to a magistrate is defective without showing that the magistrate was in the execution of his duty at the time. *R. v. Lease*, Andr. 226. And so an indictment against a public officer for non-performance of a duty without showing that he was such an officer as was bound by law to perform that particular duty. 5 T. R. 623.

At the same time it is not necessary, when a minor offence is inclosed in a greater, to introduce the averments showing the defendant to have been guilty of the greater offence, though these should be proved by the evidence. The defendant, however, on such an indictment, can be convicted only of the minor offence. See *State v. Bowling*, 10 Humph. 52; Wh. Cr. L. 8th ed. § 27.

It is not enough to state a mere conclusion of law. Wh. Cr. Pl. & Pr. § 230; and see U. S. v. Cruikshank, 92 U. S. 544; *State v. Record*, 56 Ind. 107. Thus it would be insufficient to charge the defendant with "stealing" or "murdering." 1 Roll. Rep. 79; 2 Roll. Ab. 79; 2 Stra. 699; 2 Hawk. c. 25, s. 59; Com. Dig. Indictment, G. 3; Bac. Ab. Indictment, G. 1. Wh. Cr. Pl. & Pr. § 230. So it is bad to accuse him of being a common defamer, vexer, or oppressor of many men; 2 Roll. Ab. 79; 1 Mod. 71; 2 Stra. 848, 1246, 1247; 2 Hale, 182; 2 Hawk. c. 25, s. 59; Com. Dig. Indict. G. 3; Bac. Ab. Indict. G. 1. Or a common disturber of the peace, and having stirred up divers quarrels. *Ibid.* Wh. Cr. Pl. & Pr. §§ 230, 231. Or a common forestaller. Moore, 302; 2 Hawk. c. 25, s. 59; Bac. Ab. Indict. G. 1. Or a common thief. *Ibid.*; 2 Roll. Ab. 79; 2 Hale, 182; Cro. C. C. 37. Or a common evil doer. 2 Hawk. c. 25, s. 59; Bac. Ab. Indict. G. 1.; Wh. Cr. Pl. & Pr. §§ 230, 231. Or a common champertor. 2 Hale, 182; 2 Hawk. c. 25, s. 59; Bac. Ab. Indict. G. 1. Or a common conspirator, or any other such vague accusation. *Ibid.*; Com. v. Wise, 110 Mass. 181. See Wh. Cr. L. 8th ed. §§ 1429, 1442-8. On the same reasoning, in an indictment for obtaining money by false pretences, it will not suffice merely to state that the defendant falsely pretended certain allegations, but it must also be stated by express averment, what parts of the representation were false, for otherwise the defendant will not know to what circumstances the charge of falsehood is intended to apply. 2 M. & S. 379. See Wh. Cr. L. 8th ed. § 1213. It is also not sufficient, generally, to charge "malicious mischief" or "malicious injury;" the facts of the injury must be given. Wh. Cr. L. 8th ed. § 1080; and see *Ibid.* § 1841. An indictment, on the same principle, charging a man with being a common cheat, or a common swindler or defrauder, is bad, and is not helped by an averment that, by divers false pretences and false tokens, he deceived and defrauded divers good citizens of the said State. Wh. Cr. L. 8th ed. §§ 1129, 1442-8, 1450; U. S. v. Royall, 3 Cranch C. C. R. 618. See for further illustrations, Wh. Cr. Pl. & Pr. § 154; *infra*, 499.

A count charging the defendant with voting without having the legal qualifications of a voter is defective. *People v. Wilber*, 4 Parker C. R. 19; *Pearce v. State*, 1 Sneed, 63; *Quinn v. State*, 35 Ind. 485; but see *State v. Lockbaum*, 38 Conn. 400. And so of a count which charges the defendant with unlawfully and fraudulently adulterating "a certain substance intended for food, to wit, one pound of confectionery." *Com. v. Chase*, 125 Mass. 202.

There are, however, several marked exceptions to the rule requiring the offence, in each case, to be specifically set forth. Thus, an indictment charging one with being a "common barrator" (*Inf.* 780); or, a "common scold" (*Inf.* 779); or, a "common night-walker" (*State v. Dowers*, 45 N. H. 543; *Inf.* 779 *a*); is good. The same rule applies to certain lines of nuisance, to describe which generic terms are adequate, as is the case with a "house of ill-fame;" a "disorderly house" (*State v. Patterson*, 7 Ired. 70; *Wh. Cr. L.*, *ut supra*. *Inf.* 722); and a "tippling-house." *State v. Collins*, 48 Me. 217. See *Com. v. Pray*, 13 Pick. 359; 1 Term R. 754; 1 Russell, 301. So an indictment for betting at faro bank need not set out the particular nature of the game, nor the name of the person with whom the bet was made. *State v. Ames*, 1 Mo. 372. See *Wh. Cr. L.* 8th ed. § 1466. But an indictment, as has just been seen, charging the defendant as a common cheat, is bad. *Wh. Cr. L.* 8th ed. §§ 1128, 1129, 1442.

If a particular fact which is matter of description and not vital to the accusation cannot be ascertained, the indictment will be good, if it state that such fact is unknown to the grand jury, provided that the fact in question be described as accurately as possible. *State v. Wood*, 53 N. H. 484; *Com. v. Ashton*, 125 Mass. 384; *Com. v. Fenno*, 125 Mass. 387; *Com. v. Martin*, 125 Mass. 394; *Com. v. Webster*, 5 Cush. 295; *People v. Taylor*, 3 Denio, 91. As to instrument of death see *Wh. Cr. L.* 8th ed. § 525; *Com. v. Webster*; *ut supra*; *State v. Williams*, 7 Jones (N. C.), 446. *Com. v. Martin*, 125 Mass. 394. But "this allegation, that the name or other particular fact is 'unknown to the grand jury,' is not merely formal; on the contrary, if it be shown that it was, in fact, known to them, then, the excuse failing, it has been repeatedly held that the indictment was bad, or that the defendant should be acquitted, or the judgment arrested or reversed." *Christianey, J.*, in *Merwin v. People*, 26 Mich. 298, citing *R. v. Walker*, 3 Camp. 264; 1 Chitty's Cr. Law, 213; *R. v. Robinson*, Holt N. P. 595, 596; *Blodget v. State*, 3 Ind. 403; and see *Com. v. Hill*, 11 Cush. 137; *Hays v. State*, 13 Mo. 246; *Reed v. State*, 16 Ark. 499.

A bill of particulars or specification of facts is a matter exclusively at the discretion of the court. *Com. v. Snelling*, 15 Pick. 321; *Com. v. Giles*, 1 Gray, 466. See *Inf.* 615, n. for form. See more fully *Wh. Cr. Pl. & Pr.* §§ 702 *et seq.* As to embezzlement, see *Wh. Cr. L.* 8th ed. § 1048. As to conspiracy see *Ibid.* § 1386; and see, generally, *R. v. Kendrick*, 5 A. & E. (Q. B.) 49; *R. v. Hamilton*, 7 C. & P. 448; *R. v. Brown*, 8 Cox C. C. 69; *Com. v. Davis*, 11 Pick. 432; *Com. v. Wood*, 4 Gray, 11; *People v. McKinney*, 10 Mich. 54. Unnecessary averments or aggravations can be considered as surplusage, and as such disregarded. See *Wh. Cr. Ev.* §§ 138 *et seq.*; *U. S. v. Claflin*, 13 Blatch. 178; *State v. Ballard*, 2 Murph. 186; *State v. Munch*, 22 Minn. 67. For illustrations see *Wh. Cr. Pl. & Pr.* § 158.

Surplusage is not ground for demurrer. *Steph. Pl.* 376. But even though an averment is more particular than it need be, yet if it cannot be stricken out without removing an essential part of the case, it cannot be regarded as surplusage; and if there be a variance in proving it, the prosecution fails. *R. v. Deeley*, 1 Mood. C. C. 303; *U. S. v. Foye*, 1 Curt. C. C. 364; *State v. Noble*, 15 Me. 476; *Com. v. Wellington*, 7 Allen, 299; *Wh. Cr. Ev.* §§ 109, 146.

A *videlicet* may be extended to allegations of quantity, of distance, of localization, of differentiation, so as to introduce a specification, by way of definition, to a clause immediately preceding, and thus to separate, by a kind of bracketing, this specification from other clauses. *Wh. Cr. Pl. & Pr.* § 158 *a*. How

far specifications are requisite in indictments for assaults and attempts will be considered under the special forms to be hereafter given. *Infra*, 213, 1046.

"*Or*."—The certainty required in an indictment precludes the adoption of an alternative statement. See *State v. Charlton*, 11 W. Va. 332. Thus an indictment is defective which charges the defendant with one or other of two offences, in the disjunctive, as that he murdered *or* caused to be murdered, *forged or* caused to be forged. 2 Hawk. c. 35, s. 58; *R. v. Stocker*, 1 Salk. 342, 371; *Com. v. Perrigo*, 3 Mete. (Ky.) 5; *People v. Tomlinson*, 35 Cal. 503. So of conveyed *or* caused to be conveyed, etc. *R. v. Flint*, Hardw. 370. See *R. v. Morely*, 1 Y. & J. 221; *State v. Gary*, 36 N. H. 359; *State v. Drake*, 1 Vroom, 422; *Noble v. State*, 59 Ala. 73. And the same, if it charge him in two different characters, in the disjunctive, as *quod A. existens servus sive deputatus*, took, etc. *Smith v. Mall*, 2 Roll. Rep. 263. And so where the defendant is charged with having administered a poison *or* drug (*State v. Drake*, 1 Vroom, 422; *Com. v. France*, 2 Brewst. 568; *State v. Green*, 3 Heisk. 131; *Whiteside v. State*, 4 Cold. 183. See *Wingard v. State*, 13 Ga. 396; *or* having sold spirituous *or* intoxicating liquors. *Com. v. Grey*, 2 Gray, 501. But see *Cunningham v. State*, 5 W. Va. 508. So, generally, an indictment which may apply to either of two different offences, and does not specify which, is bad. *R. v. Marshall*, 1 Mood. C. C. 158; *State v. Harper*, 64 N. C. 129; *Johnson v. State*, 32 Ala. 583; *Horton v. State*, 60 Ala. 73. As to averment of such disjunctive allegations see Wh. Cr. Pl. & Pr. § 228. That such averments are divisible see Wh. Cr. Pl. & Pr. §§ 228, 251. On the other hand, alternatives have been permitted when they qualify an unessential description of a particular offence, and do not touch the offence itself. *Barnett v. State*, 54 Ala. 579; *State v. Newsom*, 13 W. Va. 859. See for illustrations Wh. Cr. Pl. & Pr. § 161. The principle seems to be, that "or" is only fatal when it renders the statement of the offence uncertain, and not so when one term is used only as explaining or illustrating the other. *Com. v. Grey*, 2 Gray, 501; *Brown v. Com.*, 8 Mass. 59; *People v. Gilkinson*, 4 Park. C. C. 26; *State v. Ellis*, 4 Mo. 474. See *Morgan v. Com.*, 7 Grat. 592. "Or," also, may be introduced in enumerating the negative averments required to exclude the exceptions of a statute. *Ibid.*; *State v. Burns*, 20 N. H. 550. And ordinarily the objection, if good, cannot be taken after verdict. *Johnson v. State*, 50 Ala. 456.

Even where a statute disjunctively enumerates offences, or the intent necessary to constitute such offences, the indictment cannot charge them disjunctively. *U. S. v. Armstrong*, 5 Phil. Rep. 273; *State v. Colwells*, 3 R. I. 284; *State v. Price*, 6 Halst. 203; *Jones v. State*, 1 McMullan, 236; *Whiteside v. State*, 4 Cold. 183. Wh. Cr. Pl. & Pr. § 228. For illustrations see Wh. Cr. Pl. & Pr. § 162. The successive gradations of statutory offences cannot, therefore, be stated disjunctively; though to state them conjunctively, when they are not repugnant, is allowable. *R. v. North*, 6 D. & R. 143; *U. S. v. Armstrong*, 5 Phil. Rep. 273; *Com. v. Grey*, 2 Gray, 501; *State v. Price*, 6 Halst. 203; *Angel v. Com.*, 2 Va. Cas. 231; *Rasnick v. Com.*, *Ibid.* 356; *Jones v. State*, 1 McMullan, 236; *State v. Meyor*, 1 Speers, 305; *Wingard v. State*, 13 Ga. 396; *State v. McCollum*, 44 Mo. 343; *Keefer v. State*, 4 Ind. 246; *People v. Ah Woo*, 28 Cal. 205; and cases cited, *supra*.

Intent, when qualifying the character of the act, as when there is an attempt or assault to commit an offence, must be averred (*Com. v. Hersey*, 2 Allen, 173; *State v. Garvey*, 11 Minn. 154; *State v. Davis*, 26 Tex. 201; *People v. Congleton*, 44 Cal. 92); and must be attached to all the material allegations. *R. v. Rushworth*, R. & R. 317; *Com. v. Boynton*, 12 Cush. 500; *Com. v. Dean*, 110 Mass. 64.

But where the intent is to be *prima facie* inferred from the facts stated, it need not, unless part of the statutory definition, be specifically averred. Thus, while intent must be averred in an indictment for an attempt to steal, it need not be averred in an indictment for larceny. *Ibid.*

Where intent is part of the statutory definition of the offence it must be averred.

In some States the allegation of intent may by statute be dispensed with. Wh. Cr. Pl. & Pr. § 164.

In negligent offences, to allege intent is a fatal error, unless the allegation be so stated as to be capable of discharge as surplusage. See Wh. Cr. L. 8th ed. §§ 125 *et seq.*

Scienter.—Where *guilty knowledge* is not a necessary ingredient of the offence, or, where the statement of the act itself necessarily includes a knowledge of the illegality of the act, no averment of knowledge is necessary. 1 Hale P. C. 561; 2 East P. C. 51; 6 East, 474; 1 B. & P. 86; Com. v. Elwell, 2 Met. (Mass.) 190; Com. v. Boynton, 12 Cush. 499; Com. v. Stout, 7 B. Monr. 247; Turner v. State, 1 Ohio St. 422; State v. Freeman, 6 Blackf. 248; Wh. Cr. Pl. & Pr. § 272. It is otherwise where guilty knowledge is not so implied and is a substantive ingredient of the offence. U. S. v. Buzzo, 18 Wall. 125; State v. Card, 34 N. H. 510; Com. v. Dean, 110 Mass. 64; People v. Lohman, 2 Barb. S. C. 216; Com. v. Blumenthal, cited *infra*, 528, n.; Gabe v. State, 1 Eng. (Ark.) 519; Norman v. State, 24 Miss. 54; Stein v. State, 37 Ala. 123. Thus in an indictment for selling an obscene book, a *scienter* is necessary (Com. v. McGarrigall, cited 1 Bennett & Heard's Lead. Cas. 551; see also State v. Carpenter, 20 Vt. 9; Com. v. Kirby, 2 Cush. 577; State v. Brown, 2 Speers, 129), and so in an indictment for selling unwholesome water (Stein v. State, 37 Ala. 123); and in indictments for assaulting officers (Wh. Cr. L. 8th ed. § 649); though it has not been held necessary in an indictment for adultery. Com. v. Elwell, 2 Met. 190; Wh. Cr. L. 8th ed. § 1731.

Under a statute, where the guilty knowledge is part of the statutory definition of the offence, it must be averred. R. v. Jukes, 8 Term R. 625; R. v. Myddleton, 6 Term R. 739; 1 Starkie C. P. 196; State v. Gove, 34 N. H. 510; People v. Lohman, 2 Barb. 216; State v. Stimson, 4 Zab. 478; State v. Bloodow, 45 Wis. 279. See U. S. v. Schuler, 6 McLean, 28. As to receiving stolen goods, see Inf. 450; Wh. Cr. L. 8th ed. § 999. As to false pretences, Inf. 528; Wh. Cr. L. 8th ed. § 1225. As to adultery, Inf. 995; Wh. Cr. L. 8th ed. § 1731. As to incest, etc., Inf. 1000; Wh. Cr. L. 8th ed. § 1752. As to poisoning, Inf. 1059; Wh. Cr. L. 8th ed. § 524. As to offences on the high seas, Inf. 1061 *et seq.*; Wh. Cr. L. 8th ed. §§ 1871, 1886. As to perjury, Inf. 577; Wh. Cr. L. 8th ed. § 1286. But where an act is made indictable irrespective of the *scienter*, the *scienter* is not to be averred in the indictment, since if it were, it might be regarded as a descriptive allegation, which it is necessary to prove. Wh. Cr. L. 8th ed. § 88; R. v. Gibbons, 12 Cox C. C. 237; R. v. Hicklin, L. R. 3 Q. B. 360; R. v. Prince, L. R. 1 C. C. R. 154; State v. Goodenow, 65 Me. 30; State v. Bacon, 7 Vt. 219; Com. v. Elwell, 2 Met. 110; Com. v. Thompson, 11 Allen, 23; Com. v. Smith, 103 Mass. 444; Phillips v. State, 17 Ga. 459.

Matters of inducement or aggravation do not require so much certainty as the statement of the gist of the offence. R. v. Wright, 1 Vent. 170; Com. Dig. Indict. G. 5. As to evidence of surplusage of this kind, see Wh. Cr. Ev. §§ 138 *et seq.* And where the offence cannot be stated with complete certainty, it is sufficient to state it with such certainty as it is capable of. R. v. —, 1 Chit. Rep. 698; R. v. Eccles, 1 Leach, 274; R. v. Gill, 2 Barn. & Ald. 204; Com. v. Judd, 2 Mass. 329; Com. v. Collins, 3 S. & R. 220; Com. v. Mifflin, 5 Watts & S. 461.

Statutory Offences.—Where a statute prescribes or implies the form of the indictment, it is usually sufficient to describe the offence in the words of the statute, and for this purpose it is essential that these words should be used. In such case the defendant must be specially brought within all the material words of the statute; and nothing can be taken by intendment. Whether this can be done by a mere transcript of the words of the statute depends in part upon the structure of the statute, in part upon the rules of pleading adopted by statute or otherwise, in the particular jurisdiction. On the general principles of common law pleading, it may be said that it is sufficient to frame the indictment in the words

of the statute, in all cases where the statute so far individuates the offence that the offender has proper notice, from the mere adoption of the statutory terms, what the offence he is to be tried for really is. But in no other case is it sufficient to follow the words of the statute. It is no more allowable, under a statutory charge, to put the defendant on trial without specification of the offence, than it would be under a common law charge. For authorities for these positions, see Wh. Cr. Pl. & Pr. §§ 220 *et seq.* And besides this general principle, there are the following settled exceptions to the rule before us.

(1) Statutes frequently make indictable common law offences, describing them in short by their technical name, *e. g.* "burglary," "arson." No one would venture to say that in such cases indictments would be good charging the defendants with committing "burglary" or "arson."

(2) A statute may be one of a system of statutes, from which, as a whole, a description of the offence must be picked out. Thus, a statute makes it indictable to obtain negotiable paper by false pretences. But what are "false pretences?" To learn this we have to go to another statute, and this statute, it may be, refers to another statute, giving the definition of terms. No one of these statutes gives an adequate description of the offence, nor can such description be taken from them in a body. It is inferred from them, not extracted from them.

(3) A statute on creating a new offence describes it by a popular name. It is made indictable, for instance, to obtain goods by "falsely personating" another. But no one would maintain that it is enough to charge the defendant with "falsely personating another." So far from this being the case, the indictment would not be good unless it stated the kind of personation, and the person on whom the personation took effect. An Act of Congress, to take another illustration, makes it indictable to "make a revolt," but under this act it has been held necessary to specify what the revolt is. *U. S. v. Almeida*, *Infra*, 1061. "Fraud" in elections, in a Pennsylvania statute, is made indictable; but the indictment must set out what the fraud is. *Com. v. Miller*, 2 Pars. 197.

(4) The terms of a statute may be more broad than its intent, in which case the indictment must so differentiate the offence (though this may bring it below the statutory description) as may effectuate the intention of the legislature. *U. S. v. Pond*, 2 Curtis C. C. 268; *Com. v. Slack*, 19 Pick. 304; *Com. v. Collins*, 2 Cush. 556.

(5) An offence, when against an individual, must be specified as committed on such an individual, when known, though no such condition is expressed in the statute; though it is otherwise with nuisances, and offences against the public. *Com. v. Ashley*, 2 Gray, 357; Wh. Cr. L. 8th ed. §§ 1410 *et seq.*

(6) An indictment, when professing to recite a statute, is bad if the statute is not set forth correctly. Wh. Cr. Pl. & Pr. § 222. It is otherwise when the statute is counted on (or appealed to by the conclusion against the form of the statute, etc.), in which case, as is hereafter noticed, terms convertible with those in the statute may be used. Wh. Cr. Ev. §§ 91 *et seq.*; *Com. v. Unknown*, 6 Gray, 489; *State v. Petty*, Harp. 59; *Butler v. State*, 3 McCord, 383; *Hall v. State*, 3 Kelly, 18.

(7) Where a general word is used, and afterwards more special terms, defining an offence, an indictment charging the offence must use the most special terms; and if the general word is used, though it would embrace the special term, it is inadequate. *State v. Plunkett*, 2 Stew. 11; *State v. Raiford*, 7 Port. 101; *Archbold*, C. P. 93.

(8) An indictment on a private statute must set out the statute at full. *State v. Cobb*, 1 Dev. & Bat. 115; *Goshen v. Sears*, 7 Conn. 92; 1 Sid. 356; 2 Hale, 172; 2 Hawk. c. 25, s. 103; Bac. Ab. Indict. p. 2. It is otherwise with a public statute. Wh. Cr. Pl. & Pr. § 224.

(9) It is not necessary to indicate the particular section, or even the particular statute, upon which the case rests. *Com. v. Griffin*, 21 Pick. 523, 525; *Com. v. Wood*, 11 Gray, 85; *Com. v. Thompson*, 108 Mass. 461.

(10) The indictment must show what offence has been committed and what

penalty incurred by positive averment. It is not sufficient that they appear by inference. Wh. Cr. Pl. & Pr. § 225.

(11) Where a statute creates an offence, which, from its nature, requires the participation of more than one person to constitute it, a single individual cannot be charged with its commission unless in connection with persons unknown. Wh. Cr. Pl. & Pr. § 227.

(12) Though the language of the statute be disjunctive, *e. g.* burned *or* caused to be burned, and the indictment charge the offence in the conjunctive, *e. g.* burned *and* caused to be burned, the allegation, as has been noticed, is sufficient. Wh. Cr. Pl. & Pr. § 228. And it is held that when the words of the statute are synonymous, it may not be error to charge them alternatively.

(13) Whenever a statute attaches to an offence certain technical predicates, these predicates must be used in the indictment. Thus in an indictment on the statute which makes it high treason to clip, round, or file any of the coin of the realm, "for wicked lucre or gain sake," it was held necessary to charge the offence to have been committed for the sake of wicked lucre or gain. 1 Hale, 220. For other illustrations see Wh. Cr. Pl. & Pr. § 235.

(14) A statute may include cumulative terms of aggravation, for which substitutes may be found without departing from the sense of the statutory definition; or, as in the case of the Pennsylvania and cognate statutes dividing murder into two degrees, the terms used to indicate the *differentia* of the offence may be regarded as so far equivalents of the common law description that the common law description may be held to be proper, and the introduction of the statutory terms unnecessary. Or, another word may be held to be so entirely convertible with one in the statute that it may be substituted without variance. In such case a deviation from the statutory terms may be sustained. *U. S. v. Nunnemacher*, 7 Biss. 129; *Dewee's case*, Chase's Dec. 531; *Tully v. People*, 67 N. Y. 15; *State v. Shaw*, 35 Iowa, 575; *McCutcheon v. State*, 69 Ill. 601; *State v. Welch*, 37 Wis. 196; *State v. Lawrence*, 81 N. C. 521; *State v. Thorne*, 81 N. C. 558; *Roberts v. State*, 55 Miss. 414; *State v. Watson*, 65 Mo. 115. Thus, if the word "*knowingly*" be in the statute and the word "*advisedly*" be substituted for it in the indictment (*R. v. Fuller*, 1 B. & P. 180); or the word "*wilfully*" be in the statute and "*maliciously*" in the indictment, the words "*advisedly*" and "*maliciously*," not being in the statutes respectively, the indictment would be sufficient. In further illustration of this view it may be mentioned that "excite, move, and procure" are held convertible with "command, hire, and counsel" as used in the statute (*R. v. Grevil*, 1 And. 194); and "without lawful authority and excuse" with "without lawful excuse." *R. v. Harvey*, L. R. 1 C. C. 284. It is not essential, on an indictment on the Slave-trade Act of 20th of April, 1818, c. 86, §§ 2 and 3, to aver that the defendant knowingly committed the offence. *U. S. v. Smith*, 2 Mason, 143.

(15) When a statute uses a *nomen generalissimum* as such (*e. g.* cattle), then a particular species can be proved; but when the statute enumerates certain species, leaving out others, then the latter cannot be proved under the *nomen generalissimum*, unless it appears to have been the intention of the legislature to use it as such. *R. v. Welland*, R. & R. 494; *R. v. Chard*, R. & R. 488. See *State v. Abbott*, 20 Vt. 537; *Taylor v. State*, 6 Humph. 285; *State v. Plunket*, 2 Stew. 11; *State v. Godet*, 7 Ir'd. 210; *Shubrick v. State*, 2 S. C. 21; though see *State v. McLain*, 2 Brev. 443.

(16) When "provisos" and "exceptions" are not by the statute incorporated in the definition of the offence, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the statutory provisos. For authorities see Wh. Cr. Pl. & Pr. § 238. Nor is it necessary to allege that he is not within the benefit of the provisos, though the purview should expressly notice them; as by saying that none shall do the act prohibited, except in the cases thereafter excepted. Wh. Cr. Pl. & Pr. § 238. Extenuation which comes in by way of subsequent proviso or exception need not be pleaded by the prosecution *Ibid.*

(17) Where a proviso adds a qualification to the enactment, so as to bring a case within it, which, but for the proviso, would be without the statute, the indictment must show the case to be within the proviso. *Ibid.* § 239.

(18) Where a statute forbids the doing of a particular act, without the existence of either one of two conditions, the indictment must negative the existence of both these conditions before it can be supported. *Ibid.*

(19) Where exceptions are stated in the enacting clause (under which term is to be understood all parts of the statute which define the offence), unless they be mere matters of extenuation or defence, it will be necessary to negative them, in order that the description of the crime may in all respects correspond with the statute. 2 Hale. 170; 1 Burr. 148; Fost. 430; 1 East Rep. 646, in notes; 1 T. R. 144; 1 Ley, 26; Com. Dig. Action, Statute; 1 Chitty on Plead. 357; State *v.* Munger, 15 Vt. 290; State *v.* Godfrey, 24 Me. 232; though see State *v.* Price, 12 Gill & J. 260; Elkins *v.* State, 13 Ga. 435; Metzker *v.* People, 14 Ill. 101. For illustrations see Wh. Cr. Pl. & Pr. § 240.

(20) As a rule mere excusatory defence is not to be negative in the indictment. See 1 Benn. & Heard's Lead. Cas. 250; State *v.* Abbey, 29 Vt. 60; Com. *v.* Hart, 11 Cush. 130; Com. *v.* Jennings, 121 Mass. 47; State *v.* O'Donnell, 10 R. I. 472; Hill *v.* State, 53 Ga. 472; Neales *v.* State, 10 Mo. 498; Surratt *v.* State, 45 Miss. 601; Wh. Cr. L. 8th ed. § 1713.

(k) The constitutions of most of the States contain a provision that all indictments shall conclude against their peace and dignity respectively, and when so the conclusion must be thus given in the indictment. See for forms, Inf. chap. iii.; and see Lemons *v.* State, 4 W. Va. 755; Rice *v.* State, 3 Heisk. 215; Holden *v.* State, 1 Tex. Ap. 225. But informations are not bound by the limitation. Nicholas *v.* State, 35 Wis. 308. Thus in Pennsylvania, it is provided that all prosecutions shall be carried on in the name and by the authority of the Commonwealth of Pennsylvania, and conclude "against the peace and dignity of the same." *Constit. art. v. § 23.* And the proper conclusion of an indictment in Pennsylvania, said the Supreme Court, is "against the peace and dignity of the Commonwealth of Pennsylvania." *Com. v. Rogers*, 5 S. & R. 463. In New Hampshire, the Constitution requires all indictments to terminate "against the peace and dignity of the State;" and it has been held, that it is sufficiently complied with by an indictment concluding "against the peace and dignity of our said State." *State v. Kean*, 10 N. H. 347. In South Carolina, an indictment stating an offence against the State, and concluding with the words "against the peace and dignity of the same," is good within the terms of the Constitution of 1790. *State v. Washington*, 1 Bay, 120. Where an indictment commenced "South Carolina," and not the "State of South Carolina," and concluded "against the peace and dignity of the said State," and not against the peace and dignity of the same, the court held the termination good. *State v. Anthony*, 1 McCord, 285. In the same State an indictment was held good, though it concluded "against the peace and dignity of this State," instead of concluding "against the peace and dignity of the same State." *State v. Yancey*, 1 Con. R. 237. But the conclusion must be against the peace and dignity of the State. *State v. Strickland*, 10 S. C. 19. Whenever required by constitution or statute, the omission of the conclusion "against the peace," etc., will be held fatal. *Com. v. Carney*, 4 Grat. 546; *Thompson v. Com.* 20 Grat. 724; *Lemons v. State*, 4 W. Va. 755; *State v. Allen*, 8 W. Va. 680; *State v. McCoy*, 29 La. An. 593; *State v. Lopez*, 19 Mo. 254; *State v. Reaky*, 1 Mo. Ap. 3; *State v. Durst*, 7 Tex. 74. By the Constitution of Arkansas, indictments must conclude "against the peace and dignity of the State of Arkansas" (*Buzzard v. State*, 20 Ark. 106), but the interpolation of the words, "people of the," will not vitiate. "The form adopted by the Constitution," it was said, "is merely declaratory, and in affirmance of an old principle, not the creation of a new one." *Anderson v. State*, 5 Pike, 445. And if there be several counts in an indictment, each one must so conclude, or the court will quash the count in which the proper conclusion is omitted. *State v. Cadle*, 19 Ark. 613. In Mississippi, an indictment

commencing with the words, "The State of Mississippi," and concluding, "against the peace and dignity of the same," is sufficient. *State v. Johnson*, 1 Walk. 392. In Illinois, an indictment concluding "against the peace and dignity of the people of the State of Illinois," is good. *Zarresseller v. People*, 17 Ill. 101. An indictment in Kentucky, which states in the commencement correctly the name of the commonwealth, by the authority of which it proceeds, may conclude against the peace and dignity of the commonwealth, without stating the name, nor is it necessary even to aver "the authority," of the commonwealth. *Com. v. Young*, 7 B. Mon. 1; *Allen v. Com.*, 2 Bibb, 210. The Constitution of Iowa requires proceedings to be conducted in the name of the "State of Iowa;" and under it, it is held that an indictment in the name of the "State of Iowa" is good. *Harriman v. State*, 2 Greene (Iowa), 270.

In the United States courts, a conclusion "contrary to the true intent and meaning of the act of congress, in such case made and provided," has been held sufficient. *U. S. v. La Costa*, 2 Mason, 129; *U. S. v. Smith*, 2 Mason, 143. But see *U. S. v. Crittenden*, 1 Hempst. 61. But an indictment charging A. with having committed an offence, made such by a statute, "in contempt of the laws of the United States of America," is bad. *U. S. v. Andrews*, 2 Paine C. C. 451.

Where a statute creates an offence, or declares a common law offence, when committed under particular circumstances, not necessarily in the original offence, punishable in a different manner from what it would have been without such circumstances; or, where the statute changes the nature of the common law offence to one of a higher degree, as where what was originally a misdemeanor is made a felony, the indictment should conform to the statute creating or changing the nature of the offence, and should conclude against the form of the statute. Under a statute revising and absorbing the common law, the conclusion must be statutory. *Wh. Cr. Pl. & Pr.* § 280, where authorities are given.

But it is otherwise where the statute is only declaratory of what was a previous offence at common law, without adding to or altering the punishment. And where a statute only inflicts a punishment on that which was an offence before, judgment may be given for the punishment prescribed therein, though the indictment does not conclude *contra formam statuti*, etc. *Ibid.* § 281.

The proper office of the conclusion, *contra formam statuti*, is to show the court the action is founded on the statute, and is not an action at common law. *Crain v. State*, 2 Yerg. 390. One count concluding "*contra formam*," etc., does not cure another without the proper conclusion. *State v. Soule*, 20 Me. 19. But such a conclusion of the final count has been held in Alabama to validate prior counts defective in this respect. *McGuire v. State*, 1 Ala. Sel. Ca. 69; 37 Ala. 161.

Where the offence is governed or limited by two statutes, there have been various distinctions taken respecting the conclusion against the form of the statutes in the plural or the statute in the singular. The rule given by the older writers is, that where an offence is prohibited by several independent statutes, it was necessary to conclude in the plural; but now the better opinion seems to be, that a conclusion in the singular will suffice. 1 Hale, 173; *Sid.* 348; *Owen*, 135; 2 *Leach*, 827; 1 *Dyer*, 347 *a*; 4 *Co.* 48; 2 *Hawk.* c. 25, s. 117; *R. v. Pim*, *R. & R.* 425; though see *R. v. Adams*, *C. & M.* 299; *U. S. v. Trout*, 4 *Biss.* 105; *Butman's case*, 8 *Greenl.* 113; *Kane v. People*, 9 *Wend.* 203; *Townley v. State*, 3 *Harr. N. J.* 311; *State v. Jones*, 4 *Halst.* 357; *State v. Dayton*, 3 *Zabr.* 49; *Bennett v. State*, 3 *Ind.* 167; *State v. Robbins*, 1 *Strobh.* 355; *State v. Bell*, 3 *Ired.* 506. The practice is to conclude in the singular in all cases, though in Maryland (*State v. Cassel*, 2 *Harr. & Gill*, 407; see also *State v. Pool*, 2 *Dev.* 202) it has been held that when an offence is prohibited by one act of assembly, and the punishment prescribed and affixed by another, the conclusion should be against the acts of assembly.

Though there is but one statute prohibiting an offence, it is not fatal for the indictment to conclude contrary to the "statutes."

In a common law indictment, the words *contra formam statuti* may be rejected

as surplusage. And where an offence, both by statute and common law, is badly laid under the statute, the judgment may be given at common law. *State v. Burt*, 25 Vt. 373; *State v. Gove*, 34 N. H. 510; *State v. Buckman*, 8 N. H. 203; *State v. Phelps*, 11 Vt. 117; *Com. v. Hoxey*, 16 Mass. 385; *Knowles v. State*, 3 Day, 103; *Southworth v. State*, 5 Conn. 325; *Com. v. Gregory*, 2 Dana, 417; *Resp. v. Newell*, 3 Yeates, 407; *Penn. v. Bell*, Addison, 171; *Haslip v. State*, 4 Hayw. 273; 2 Hale, 190; *Alleyn*, 43; 1 Salk. 212, 213; 5 T. R. 162; 2 Leach, 584; 2 Salk. 460; 1 Ld. Raym. 1163; 1 Saund. 135, n. 3; 2 Hawk. c. 25, s. 115; *Bac. Ab. Indict. H. 2*; *Burn, J.*, ix.

(1) Offences, though differing from each other, and varying in the punishments authorized to be inflicted for their perpetration, may be included in the same indictment, and the accused tried upon the several charges at the same time, provided the offences be of the same general character, and provided the mode of trial is the same. *R. v. Fussell*, 3 Cox C. C. 291; *U. S. v. O'Callahan*, 6 McLean, 596; *Charlton v. Com.* 5 Met. 532; *Josslyn v. Com.* 6 Met. 236; *Com. v. Costello*, 120 Mass. 358; *Com. v. Brown*, 121 Mass. 69 (in Massachusetts, the law is not changed by the stat. of 1861; *Com. v. Costello, supra*); *People v. Rynders*, 12 Wend. 425; *Edge v. Com.* 7 Barr, 275; *Mills v. Com.* 13 Penn. St. 631; *Hoskins v. State*, 11 Ga. 92; *Engleman v. State*, 2 Carter (Ind.), 91; *Johnson v. State*, 29 Ala. 62; *State v. Kibby*, 7 Mo. 317; *Baker v. State*, 4 Pike, 56; *Orr v. State*, 18 Ark. 540. See, however, *contra*, when punishments differ in character, *Norvell v. State*, 50 Ala. 174.

The U. S. Revised Stats. § 1024, provides that charges which may be joined in one indictment shall be joined, or may be consolidated. In misdemeanors, the joinder of several offences will not vitiate the prosecution in any stage. *Young v. R.*, 3 T. R. 105; *R. v. Jones*, 2 Camp. 132; *R. v. Benfield*, 2 Burr. 984; *R. v. Kingston*, 2 East, 468; *U. S. v. Peterson*, 1 W. & M. 305; *U. S. v. Porter*, 2 Cranch. C. C. 60; *People v. Costello*, 1 Denio, 83; *Harman v. Com.*, 12 S. & R. 69; *Com. v. Gillespie*, 7 S. & R. 476; *Weinzorpfen v. State*, 7 Blackf. 186; *State v. Gummer*, 22 Wis. 441; *Quinn v. State*, 49 Ala. 353; *State v. Randle*, 41 Tex. 292; *Wh. Cr. Pl. & Pr.* § 293. See *Wh. Cr. L.* 8th ed. § 978. In *R. v. Broughton*, 1 Trem. P. C. 111, the indictment charged no less than twenty distinct acts of extortion. That in *R. v. Sillern*, 2 H. & C. 431, hereafter noticed, contained ninety-five counts. The indictment against Mayor Hall, tried in New York, October, 1872, contained four counts for each of fifty-five different acts, containing two hundred and twenty counts in all. In felonies cognate offences may be thus joined, with a right on part of the defendant of requiring the prosecutor to elect. *Wh. Cr. Pl. & Pr.* § 290. A misdemeanor may in like manner and with the same limitations be joined with a felony. *Ib.* § 289.

After a general verdict of guilty, it is no objection to an indictment, on motion in arrest, that offences of different grades and requiring different punishments are charged in the different counts. *R. v. Ferguson*, 6 Cox C. C. 454; *U. S. v. Stetson*, 3 W. & M. 164; *State v. Hood*, 51 Me. 363; *Carlton v. Com.* 5 Met. 532; *Kane v. People*, 8 Wend. 203; *Com. v. Birdsall*, 69 Penn. St. 482; *Stone v. State*, 1 Spencer, 404; *Moody v. State*, 1 W. Va. 337; *State v. Speight*, 69 N. C. 72; *State v. Reel*, 80 N. C. 442; *Covey v. State*, 4 Port. 186; *Wh. Cr. Pl. & Pr.* §§ 737-40, 771, 910. There is also high authority, to the effect that when there is a verdict of guilty on each of a series of counts, there may be a specific sentence imposed on each (*Ibid.* §§ 908-10); though it is otherwise in respect to counts which are defective. *Ibid.* § 771; *Adams v. State*, 52 Ga. 565.

Every cautious pleader will insert as many counts as will be necessary to provide for every possible contingency in the evidence; and this the law permits. Thus he may vary the ownership of articles stolen, in larceny (*State v. Nelson*, 29 Me. 329; *Com. v. Dobbin*, 2 Parsons, 380); of houses burned, in arson (*R. v. Trueman*, 8 C. & P. 727; *Newman v. State*, 14 Wis. 393); or the fatal instrument and other incidents, in homicide. See *Wh. Cr. L.* 8th ed. § 540; *Hunter v. State*, 40 N. J. L. 495.

The reason for this is thus excellently stated by Chief Justice Shaw:—

“To a person unskilled and unpractised in legal proceedings, it may seem strange that several modes of death, inconsistent with each other, should be stated in the same document; but it is often necessary, and the reason for it, when explained, will be obvious. The indictment is but the charge or accusation made by the grand jury, with as much certainty and precision as the evidence before them will warrant. They may be well satisfied that the homicide was committed, and yet the evidence before them leave it somewhat doubtful as to the mode of death; but, in order to meet the evidence as it may finally appear, they are very properly allowed to set out the mode in different counts; and then if any one of them is proved, supposing it to be also legally formal, it is sufficient to support the indictment. Take the instance of a murder at sea: a man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide, by the blow or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts, charging a death by a blow, and a death by drowning, and perhaps a third, alleging a death by the joint results of both causes combined.” *Bemis's Webster case*, 471; *S. C.*, 5 *Cush.* 533. See also *State v. Johnson*, 10 *La. An. R.* 456; *U. S. v. Pirates*, 5 *Wheat.* 184.

How generally the same practice exists in England may appear from the very pertinent inquiry of Alderson, B., in a recent case: “Why may there not be as many counts for receiving as there are for stealing—one for each? It is really only one offence, laying the property in different persons. It is one stealing, and one receiving; and because there was some doubt as to the person to whom the property really belonged, the property is laid five different ways. If a late learned judge had drawn the indictment, you would very likely had it laid in fifty more.” *R. v. Beeton*, 2 *Car. & Kir.* 961, Alderson, B. To the same effect see *Beasley v. People*, 89 *Ill.* 571; *People v. Thompson*, 28 *Cal.* 214. See, as to verdict to be taken in such cases, *Wh. Cr. Pl. & Pr.* § 740.

“Where the felonies are of the same general nature, and supported by evidence of a similar kind, and the punishment to be awarded is the same in its nature, the more common practice is to try the whole indictment by the same jury. If there is any danger that such trial will operate to the prejudice of the defendant, the court is authorized to direct the prosecutor to elect on which count he will proceed.” *Lord, J., Pettes v. Com.*, 126 *Mass.* 245.

From the report of the English Commissioners of 1879 we take the following:—

“The Draft Code next deals with the subject of indictments, the object being to reduce them to what is really necessary for the purposes of justice. The law as it at present stands is in the form of objectionable unwritten rules, qualified by several wide exceptions which modify some of their defects. These general rules require the greatest minuteness in many matters, which need not be referred to here. Two rules, however, may be specially mentioned: (1) Indictments must not be double, and cannot be in the alternative; each count must charge one offence and no more: (2) All material averments must be proved as laid. Although these rules have been considerably relaxed in practice, the effect of them is that indictments run to a most inordinate length, and become at once so long and so intricate that it is hardly possible to understand them, and that practically no one reads them but the counsel who draw and the clerks who copy them.

“The method employed is to take a section of an act of parliament and draw a series of counts, each charging one of the offences which the section creates; and as a single section often creates many offences hardly differing from each other except by very slight shades of meaning, counts are inordinately multiplied in this manner. For instance, in *R. v. Sillem* (2 *H. & C.* 431), an information (which might have been an indictment) charged certain persons in substance with having equipped for the Confederate States, then at war with the United States, a ship called the *Alexandria*. The information was framed upon 59 *Geo.* 3, c. 69, and contained ninety-five counts. The first count charged an-equipping

with intent that the ship should be employed by certain foreign states, styling themselves the Confederate States, with intent to cruise against the Republic of the United States. The second count, instead of the Republic of the United States, mentioned the citizens of the Republic of the United States. The third count omitted all mention of the Confederate States, and called the United States the Republic of, etc. The fourth count was like the third, with the exception of returning to the expression 'citizens,' etc., after giving various names to the United States and Confederate States in the first eight counts, eight other counts were added substituting 'furnish' for 'equip.' Eight more substituted 'fit out' for 'furnish.' In short, the indictment contained a number of counts obtained by combining every operative verb of the section on which it was founded with all the other operative words."

Lord Campbell in *R. v. Rowlands*, 2 Den. C. C. 38, and Lord Denman, in *R. v. O'Connell*, 11 Cl. & F. 374, censure the undue multiplication of counts; though under common law pleading, this, in complicated cases, cannot be avoided. To split the charge in distinct indictments would unduly accumulate costs, and would expose the prosecution to an application to consolidate.

A verdict of guilty on four counts, charging the murder to have been committed with a knife, a dagger, a dirk, and a dirk-knife, is not repugnant, inconsistent, or void, since the same kind of death is charged in all the counts. *Donnelly v. State*, 2 Dutch. (N. J.) 463; affirmed in error, 2 Dutch. (N. J.) 601. To same effect see *Merrick v. State*, 63 Ind. 637.

As both in civil and criminal pleading two counts charging the same thing would be bad on special demurrer for duplicity—though the fault in civil pleading is cured by pleading over—it has been usual, by inserting the word "other" in a second count, to obviate this difficulty, through the fiction that the cause of action thus stated is new and distinct. When two counts setting out the same offences occur judgment will be arrested. *Campbell v. R.*, 11 Ad. & El. N. S. 800.

Even according to the strictest practice, the omission in an indictment, containing two counts, of an averment that they are for different offences, is cured by a verdict of not guilty on one of the counts, or the entry of a *nolle prosequi* on that count. *Com. v. Holmes*, 103 Mass. 440 (Ames, J., 1869).

The relative "said," used in one of the subsequent counts of an indictment referring to matter in a previous count, is always to be taken to refer to the count immediately preceding where the sense of the whole indictment does not forbid such a reference. *Sampson v. Com.*, 5 W. & S. 385.

Where the first count of an indictment is bad, a subsequent count may be sustained, even though it refers to the first count for some allegations, and without repeating them. *Com. v. Miller*, 2 Parsons, 480. See *State v. Lea*, 1 Cold. (Tenn.) 175. Generally, however, one bad count cannot help another bad count, which is defective in a distinct way. *State v. Longley*, 10 Ind. 482.

Even in good counts, it is unsafe to attempt to supply a material averment by mere reference to a preceding count. Time and place may be thus implied, but not, it seems, descriptive averments which enter into the vitals of the offence. See *R. v. Dent*, 1 C. & K. 249; 2 Cox C. C. 354; *R. v. Martin*, 9 C. & P. 213; *State v. Nelson*, 29 Me. 329; *Sampson v. Com.*, 5 W. & S. 385; *State v. Lyon*, 17 Wis. 237; *Keech v. State*, 15 Fla. 591; but see *Wh. Cr. Pl. & Pr.* §§ 292 *et seq.*, as to practice in counts for receiving stolen goods.

There may be cases, it seems, in which counts may be transposed after verdict. *R. v. Downing*, 1 Den. C. C. 52.

Statutes of jeofails and amendment for the cure of mere technical flaws, have been adopted in England and in most of the States in the American Union. In the U. S. courts no indictment "shall be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." This does not include any essential description. *Lowell, J., U. S. v. Conant*, 9 Report. 36.

Under the English statutes the following rulings are quoted in Roscoe's Cr. Ev. p. 206:—

"In *R. v. Frost*, 1 Dears. C. C. R. 427; S. C., 24 L. J. M. C. 61, the prisoners were charged in an indictment with having by night, in pursuit of game, entered the lands of George William Frederick Charles, Duke of Cambridge; on the trial a witness proved that George William were two of the duke's Christian names, and that he had others; no proof was given what they were. The prosecutor prayed an amendment of the indictment by striking out the names 'Frederick Charles.' This the court refused, and left the case to the jury, who, being satisfied as to the identity of the duke, convicted the prisoners. On a case reserved, the Court of Criminal Appeal quashed the conviction. Parke, B., said: 'The Court of Quarter Sessions have a power of amending given them by the statute 14 & 15 Vict. c. 100, s. 1, but they have a discretion, they are not bound to allow an amendment. Having omitted to amend at the trial, they cannot amend now. If they had asked us whether they ought to have done so, it is clear that, upon the evidence before them, they were perfectly right in refusing to make the amendment prayed for; but that they would have been equally wrong in refusing to amend had the amendment asked for been to strike out all the Christian names of the Duke of Cambridge, who was described in the indictment as George William Frederick Charles, Duke of Cambridge. According to the usual rule, the prosecutor must prove all matter of description alleged, though it was not necessary to allege it. The proper course would have been for them to have found that the person mentioned was a person who had the title of Duke of Cambridge, and to have omitted all the Christian names.'

"It has been held that an indictment for an attempt to murder A. W. may be amended by substituting for A. W. 'a certain female child whose name is to the said jurors unknown,' although the act refers only to variances in the name, or Christian or surname. *R. v. Welton*, 9 Cox C. C. 297.

"An indictment charged D. T. as a receiver of stolen goods, 'he, the said A. B., knowing them to have been stolen;' upon verdict of guilty he moved in arrest of judgment, but the Court of Quarter Sessions struck out the words 'A. B.' and substituted 'D. T.' It was held by the Court of Criminal Appeal that the court had no power to amend after verdict, so as to alter the finding of the jury, and that the prisoner was entitled to move in arrest of judgment. *R. v. Larkin*, Dears. C. C. 365; 23 L. J. M. C. 125.

"On an indictment against the defendant for obstructing a footway leading from A. to G., it appeared that the so-called footway was for half a mile from its commencement, as described in the indictment, a carriage-way; the obstruction was in the part beyond. The Court of Queen's Bench held that this was a misdescription, which ought to be amended under the 14 & 15 Vict. c. 100, s. 1. *R. v. Sturge*, 3 E. & B. 734; 77 E. C. L. R.; S. C., 23 L. J. M. C. 172.

"On an indictment for stealing 19s. 6d. the court held that the indictment might be amended by altering the words, 'nineteen and sixpence' to 'one sovereign.' *R. v. Gumble*, 42 L. J. M. C. 7; 12 Cox C. C. (C. C. R.) 248; and see *R. v. Bird*, 12 Cox C. C. (C. C. R.) 257."

As to how far verdict cures, see Wh. Cr. Pl. & Pr. § 759.

Merely clerical errors may be disregarded in error, or in motions of arrest of judgment. Wh. Cr. Pl. & Pr. § 273.

In some jurisdictions it is provided that as to certain offences certain prescribed forms shall be sufficient. See as to liquor prosecutions, Wh. Cr. L. 8th ed. § 1530; and see *State v. Comstock*, 27 Vt. 553; *Hewitt v. State*, 25 Tex. 722.

As to waiver of constitutional rights, see Wh. Cr. L. 8th ed. § 145 *a*; Wh. Cr. Pl. & Pr. § 733.

When a constitutional provision exists, formulating the common law rule, that the defendant is entitled to notice in the indictment of the charge against him, we can adopt the following conclusions:—

1. Statutes which merely facilitate the pleading in a case, such as those providing that technical objections are to be taken by demurrer, or that defects of

process must be met by motion to quash, or that formal statements as to time, place, tenor, name, and value, are open to amendment on trial, are constitutional. *State v. Comstock*, 27 Vt. 553; *Com. v. Holley*, 3 Gray, 458; *Brown v. Com.*, 78 Penn. St. 122; *Com. v. Seymour*, 2 Brewst. 567; *Cochrane v. State*, 9 Md. 400; *Trimble v. Com.*, 2 Va. Cas. 143; *Lasure v. State*, 19 Oh. St. 44; *People v. Cook*, 10 Mich. 164; *Marvin v. People*, 26 Mich. 298; *McLaughlin v. State*, 45 Ind. 338; *Rowan v. State*, 30 Wis. 129; *State v. Schricker*, 29 Mo. 265; *State v. Craighead*, 32 Mo. 561; *Noles v. State*, 24 Ala. 672; *Thompson v. State*, 25 Ala. 41; *Rocco v. State*, 37 Miss. 357; *State v. Hart*, 4 Ired. 248; *State v. Mullen*, 14 La. An. 570; *People v. Kelly*, 6 Cal. 210; *State v. Manning*, 14 Tex. 402.

2. Statutes which authorize forms which give no substantial notice of the offence, or which permit radical amendments after bill found, are unconstitutional. *State v. Learned*, 47 Me. 426; *People v. Campbell*, 4 Parker C. R. 386; *Com. v. Buzzard*, 5 Grat. 694; *State v. Wilburn*, 25 Tex. 738; *State v. Daugherty*, 30 Tex. 360.

This question, supposing the constitutional provisions are mere expressions of the common law in this respect, is discussed in *Bradlaugh v. R.*, L. R. 3 Q. B. D. 607; 14 Cox C. C. 68.

As to effect of verdict in curing formal errors, see Wh. Cr. Pl. & Pr. §§ 400, 759.

In Pennsylvania it is said that the name of the owner in larceny can be stricken out and "persons unknown" inserted. *Com. v. O'Brien*, 2 Brewster, 566. See *Phillips v. Com.*, 44 Penn. St. 197. And see, to same general effect, *Mulrooney v. State*, 26 Oh. St. 326. As to other amendments, see *State v. Arnold*, 50 Vt. 731; *People v. Mott*, 34 Mich. 80; *Garvin v. State*, 52 Miss. 207.

CHAPTER III.

COMMENCEMENTS AND CONCLUSIONS IN THE FEDERAL AND STATE COURTS.

I. FEDERAL COURTS.(a)

- (3) *Commencement in District of Massachusetts, where the offence was committed on board of an American vessel within the jurisdiction of a foreign state.*

UNITED STATES of America.

District(b) of Massachusetts, to wit (*stating the court*).

The jurors of the United States of America, within and for the district aforesaid, upon their oath present that A. B., late of Boston, in said district, mariner, on, etc. (*stating date*), * in and on board of the barque Eliza, then lying within the jurisdiction of a foreign state or sovereign, to wit, at one of the islands called the Navigator's Island, in the South Pacific, the said barque then and their being a ship or vessel of the United States, belonging(c) to certain citizens of the United States, whose names are to this inquest unknown, etc.

(a) The criminal pleading of the United States courts, like the civil pleading, is governed, unless there be special exception by federal statute, by the practice of the States in which the particular courts are situated. This is illustrated by the forms of commencements and conclusions given in the text.

(b) The district must be set forth according to its jurisdiction, as settled by act of Congress. Thus where an indictment in the Circuit Court for the Eastern District of Pennsylvania, commenced "in the Circuit Court of the United States, etc., in and for the District of Pennsylvania," Judge Washington held that it should appear by the record that the jury were sworn to inquire for the district over which the court had jurisdiction; and as by the act of 20th April, 1818, Pennsylvania was divided into two districts, and as the court in which the indictment was found had only jurisdiction over one of these districts, the judgment would have to be arrested. *U. S. v. Wood*, 2 Wheel. C. C. 325.

(c) In several of the precedents the words "in whole or in part" are here introduced, but this alternative expression is questionable.

- (4) *Same where the offence was committed on an American ship within the jurisdiction of the United States.*

*Same as above down to mark *, and then proceed :* on the waters of Long Island Sound, the same being an arm of the sea, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, in and on board of the steamer M., the same then and there being an American ship or vessel, etc.

- (5) *Same where the offence was committed on the high seas on board of an American vessel.*

*Same as above down to mark *, and then proceed :* upon the high seas within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, and within the jurisdiction of this court, on board of a certain vessel, to wit, a schooner called the William Wirt, then and there belonging to a citizen or citizens of the United States to the said inquest unknown, of which said vessel a certain J. S. S. was then and there master, etc.

- (6) *Same where offence was committed on high seas on board a vessel whose name was unknown, belonging to an American citizen whose name is given.*

*Same as above down to *, and then proceed :* upon the high seas within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, and within the jurisdiction of this court, on board of a certain vessel, to wit, a vessel the name whereof is to the jurors unknown, then and there belonging to a citizen of the United States, to wit, one J. P. V., late of the district aforesaid, etc.

- (7) *Same where offence was committed by a person who belonged to a vessel owned by American citizens, whose names are known, the vessel being at the time in the jurisdiction of a foreign state.*

*Same as above down to *, and then proceed :* within the admiralty and maritime jurisdiction of the United States, on board of a certain vessel, to wit, a sloop called the C. W., then and there belonging to S. P. W., J. C. B., and N. F., citizens of the

United States, while lying in a place, to wit, Great Harbor in Long Island, one of the Bahama Islands within the jurisdiction of a certain foreign sovereign, to wit, the king of the United Kingdom of Great Britain and Ireland, a certain J. P. M., late of the district aforesaid, mariner, then and there being a person belonging to the company of the said vessel, did, etc.

(8) *Same where offence was committed in navy yard.*

*Same as above down to *, and then proceed :* at and within the navy yard adjoining the _____ in the county of _____ in the district of _____ aforesaid, the site of which said navy yard had been, before the said _____ day of _____ in the year last aforesaid, ceded to the said United States, and was on the said last-mentioned day then and there under the sole and exclusive jurisdiction of the said United States, etc.

(9) *Same where offence was committed on ground occupied for an armory or arsenal.*

*Same as above down to *, and then proceed :* at the said town of Springfield, on land belonging to the said United States, to wit, on land occupied for an armory or arsenal, and for purposes connected therewith, out of the jurisdiction of any particular State of the said United States, and within the jurisdiction of the said United States, etc.

(10) *Commencement in Southern District of New York.*

Southern District of New York, ss. The jurors of the United States of America, in and for the district aforesaid, on their oath present that A. B., late of the City and County of New York, in the district aforesaid, heretofore did, etc. (*stating the date, and proceeding as in foregoing forms*).

(11) *Commencement in Eastern District of Pennsylvania.*

In the Circuit (*or District*) Court of the United States in and for the Eastern District of Pennsylvania, of _____ Sessions, in the year of our Lord, etc.

Eastern District of Pennsylvania, ss. The grand inquest of the United States of America, inquiring for the Eastern District of Pennsylvania, on their oaths and affirmations respectively, do

present that A. W. H., late of the district aforesaid, mariner, on the (*stating date, and proceeding as in foregoing counts*).

(12) *Commencement in District of Virginia.*

In the Circuit (*or District*) Court of the United States in and for the Virginia District of, etc. (*as in last form*).

The grand inquest of the United States of America, for the Virginia District, upon their oath do present that A. B., late of the State of New York and City of New York, attorney at law, on, etc. (*stating the date, and proceeding as in foregoing counts*).

(13) *Conclusion in District of Massachusetts.*

Against the peace and dignity(*d*) of the said United States, and contrary to the form of the statute of the United States in such case made and provided.(*e*)

(14) *Conclusion in Southern District of New York.*

Against the peace of the said United States of America and their dignity, and against the form of the statute of the said United States in such case made and provided.

(15) *Conclusion in Eastern District of Pennsylvania.*

Contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States.

(16) *Conclusion in District of Virginia.*

Against the constitution, peace, and dignity of the said United States, and against the form of the act of the Congress of the said United States in such case made and provided.(*f*)

[*Where the offence was committed within the admiralty and maritime jurisdiction of the United States, jurisdiction over the offender*

(*d*) But see *U. S. v. Boling*, 4 Cranch, C. C. R. 579, where it was held that the conclusion should be against the "government" of the United States.

(*e*) *U. S. v. La Coste*, 2 Mason, 129; *U. S. v. Smith*, 2 Mason, 143; but see *U. S. v. Crittenden*, 1 Hemp. 61. Indictments in the United States adapt themselves in their conclusion, as well as their other formal parts, to the practice of the courts of the States within whose territorial limits they are found, always retaining the *contra formam statuti* as well as the *contra pacem*, there being no common law offences against the United States.

(*f*) The form in the text was used in Burr's case.

attaches to the particular district to which he was brought, or in which he was apprehended. In order to show jurisdiction, it is necessary for the grand jury to find an additional count in all such cases, as follows:]

(17) *Final count where the offender was first apprehended in the particular district.*

And the jurors aforesaid, on their oath aforesaid (*or in Pennsylvania, on their oaths and affirmations aforesaid*), do further present, that the district of in the circuit is the district and circuit in which the said was first apprehended for the said offence.(g)

(18) *Final count where the offender was first brought into the particular district.*

And the jurors aforesaid, on their oath aforesaid (*or in Pennsylvania, on their oaths and affirmations aforesaid*), do further present, that the district of in the circuit is the district and circuit into which the said was first brought for the said offence.

II. STATE COURTS.

(19) *Maine. Commencement.*

State of Maine, Kennebec, to wit:

At the court, etc., begun, etc. (*stating style of court*), the jurors for the State of Maine upon their oath do present that, etc.

(20) *Conclusion at common law.*

Against the peace of the said State.(h)

(21) *For a statutory offence.*

Contrary to the form of the statute in such case made and

(g) See under the heads of piracy, etc., the several methods used of stating the jurisdiction in the respective circuits. The one in the text is that used in New York, and in connection with that following it, appears to me to be the most formal. In some of the forms in the last-named circuit the concluding averment is, "was first brought and apprehended."

(h) Browne's case, 1 Greenl. 177; *State v. Soule*, 20 Me. R. 19; *Bufman's case*, 8 Greenl. 113.

provided, and against the peace (or peace and dignity) of the said State.

(22) *New Hampshire. Commencement.*

State of New Hampshire, ss.

At the Court of Common Pleas holden at within and
for the County of aforesaid, on the Tuesday of
in the year of our Lord one thousand eight hundred and forty-
the jurors of the State of New Hampshire, upon their
oath, present, etc.

(23) *Conclusion for a common law offence.*

Against the peace and dignity of the State.(i)

(24) *For a statutory offence.*

Contrary to the form of the statute in such case made and
provided, and against the peace and dignity of the State.(j)

(25) *Vermont. Commencement.*

State of Vermont. Windsor County, ss.

The grand jurors within and for the body of the County of
Windsor aforesaid, now here in court duly empanelled and
sworn, upon their oath present, etc.(k)

(i) The conclusion, "against the peace and dignity of our said State," sufficiently complies with the constitutional provision that the conclusion shall be "against the peace and dignity of the State." *State v. Kean*, 10 N. Hamp. 347.

(j) *Information.*

State of New Hampshire, ss.

At the Court of Common Pleas holden at on the Tuesday of
in the year of our Lord one thousand eight hundred and forty- . Be it re-
membered that Lyman B. Walker, Esquire, Attorney-General for the State afore-
said, being here in court, gives the Court to understand and be informed, that,
etc. (*stating offence*), contrary to the form of the statute in such case made and
provided, and against the peace and dignity of the said State. Whereupon the
said attorney-general prays advice of the court in the premises, and that due
process of law may issue against the said in this behalf, to answer to the
said State in the premises, and to do therein what to law and justice may apper-
tain.

(k) This, as I am informed by Mr. Washburn, the learned reporter of the decisions of the Supreme Court, is the usual form; but in a recent case, of which he has kindly furnished me with the sheets, an indictment was sustained, beginning, "State of Vermont, Chittenden County, ss. The grand jurors for the people of the State of Vermont upon their oath present that," etc. *State v. Nixon*, 18 Vt. (3 Wash.) 70.

"To the indictment itself," said Williams, C. J., in an opinion which throws great light on this branch of pleading, "the first objection urged is, that it com-

(26) *Conclusion for common law offence.*

Against the peace and dignity of the State.(l)

(27) *Conclusion for statutory offence.*

Contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the State.

(28) *Massachusetts. Commencement.(m)*

Commonwealth of Massachusetts. Suffolk, to wit:

At the Supreme Judicial Court of said Commonwealth of Massachusetts, begun and holden at Boston, within and for the

mences, 'The grand jurors for the people of the State of Vermont.' This is not the usual form of the commencement of indictments in this State; but, nevertheless, it may be questioned whether it is not more correct than the one commonly used. The grand jurors in this State, as well as in Great Britain, are to inquire for all offences in the county for which they are returned. 2 Hawk. P. C. c. 25, p. 299. They are to present in behalf of and for the sovereign power, which is considered as the prosecutor for all public offences; and hence the style or language of the indictment is not uniform. In England, the form is, 'The grand jurors for our Lord the King on their oath present;' in New York, 'for the people,' etc.; in Massachusetts, 'for the Commonwealth.' In some cases this part of the indictment is used only to designate the jury, who present as 'The grand inquest of the United States for the district of Virginia,' 'The grand jurors of the United States in and for the body of the district of New York,' 'The grand jurors within and for the body of the county,' etc.; and this latter is the form usually adopted in this State and in Connecticut. The better form, I think, is the one used in Georgia, found in 6 Peters, 528: 'The grand jurors sworn, chosen, and selected for the county of _____ in the name and behalf of the citizens of Georgia.'

"In this State, when we wish to designate the sovereign power, we usually say, The State of Vermont; but I apprehend it is as well to designate it by the term The People. Proceedings to take the forfeiture of grants and charters were heretofore directed to be prosecuted in the name of *The People of the State*; Slade's St. 189; and, moreover, in making a record of a case arising on an indictment by a grand jury, these words might be wholly omitted; and, after the caption, which sets forth that the grand jury were empanelled, etc., it would be sufficient to say that it is presented 'that A. B.,' etc. We cannot, therefore, attach any importance to this objection to the indictment, considering it wholly immaterial whether the indictment commenced by saying, the grand jurors for the county, or for the State, or for the people of the State; and that either mode would be conformable to approved forms." *State v. Nixon*, 18 Vt. 70. See also *State v. Hooker*, 17 Vt. 659.

(l) By the constitution of Vermont, all indictments must conclude, "against the peace and dignity of the State;" sect. 32, part ii. In a common law offence, the conclusion "*contra formam*" is to be rejected as surplusage. *State v. Phelps*, 11 Vt. 118.

(m) See *Com. v. Fisher*, 7 Gray, 492.

County of Suffolk, on the first Monday of in the year of our Lord, one thousand eight hundred and forty- .

The jurors for the Commonwealth of Massachusetts upon their oath present, etc.

(29) *Conclusion for a common law offence.*

Against the peace of said Commonwealth.

(30) *For a statutory offence.*

Against the peace of said Commonwealth, and the form of the statute in such case made and provided.(n)

(31) *Connecticut. Commencement.*

State of Connecticut, etc. New Haven County, ss.
New Haven, day of

184 .

To the Honorable Superior Court of the State of Connecticut now sitting in within and for the County of on the Tuesday of .

The grand jurors within and for said county, on their oaths present and inform, etc.

(32) *Conclusion.*

Against the peace and contrary to the statute in such case made and provided.(o)

(n) "Against the peace and the statute" has in Massachusetts been held to be sufficiently formal (*Com. v. Caldwell*, 14 Mass. 330); though "against the law in such case made and provided," has been held to be too general. *Com. v. Stockbridge*, 11 Mass. 279. The object of the conclusion "against the statute" is to notify the defendant that the offence of which he is accused, and the penalty to which he may be subjected, are statutory, and not as at common law. *Com. v. Stockbridge*, 11 Mass. 279; *Com. v. Northampton*, 2 Mass. 116; *Com. v. Springfield*, 7 Mass. 9; *Com. v. Cooley*, 10 Pick. 37. The phrase "against the peace of the Commonwealth" is a proper conclusion for an offence at common law. *Com. v. Buckingham*, 2 Wheel. C. C. 182. The statutory termination, when unnecessary, may be treated as surplusage. *Com. v. Hoxey*, 16 Mass. 385.

(o) The statutory conclusion can be rejected as surplusage, if necessary, and judgment given at common law. *Knowles v. State*, 3 Day, 103; *Swift's Digest*, 684, 685; *Southworth v. State*, 9 Conn. 560.

(33) *Information by attorney for the State.*

State of Connecticut. County of New Haven, ss.

County court, November term, one thousand eight hundred and forty-five.

Dennis Kimberly, attorney to the State of Connecticut, for the County of New Haven, now here in court, information makes that, etc. (*stating the offence*).

Against the peace and contrary to the statute in such case made and provided. Whereupon the attorney prays the advice of this honorable court in the premises.

(34) *Information by grand juror.*

State of Connecticut. County of New Haven, ss.

To justice of the peace for said county, residing in said town (*or as in last form*), comes a grand juror for said town, and on his oath of office information makes, that at said New Haven on the day of 184, etc. (*stating the offence*), against the peace and contrary to the statute in such case made and provided. Wherefore the grand juror aforesaid prays process, and that the said may be arrested and held to answer the complaint, and be dealt with according to law. Dated at New Haven the day and year first aforesaid.

(35) *Rhode Island. Commencement.*

State of Rhode Island and Providence Plantations. Providence, ss.

At the Supreme Judicial Court of the State of Rhode Island and Providence Plantations, holden at Providence, within and for the County of Providence, on the third Monday of September, in the year of our Lord one thousand eight hundred and forty.

The grand jurors of the State of Rhode Island and Providence Plantations, and in and for the body of the County of Providence, upon their oaths present, that, etc.

(36) *Conclusion for common law offence.*

Against the peace and dignity of the State.

(37) *Conclusion for statutory offence.*

Against the form of the statute in such case made and provided, and against the peace and dignity of the State.

(38) *New York. Commencement.*

City and County of New York, ss.

The jurors of the people of the State of New York, in and for the body of the City and County of New York, upon their oath present, that, etc.

(39) *Conclusion for common law offence.*

Against the peace of the people of the State of New York, and their dignity.(p)

(40) *Conclusion for statutory offence.*

Against the form of the statute in such case made and provided,(q) and against the peace of the people of New York and their dignity.

(41) *New Jersey. Commencement.*

In the Court, etc.(r) County, to wit:

The grand inquest for the State of New Jersey, and for the body of the County of upon their present, that, etc.

(42) *Conclusion for common law offence.*

Against the peace of this State, the government and dignity of the same.

(43) *Conclusion for statutory offence.*

Contrary to the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

(p) See Rev. Stat. part 4, c. 2, s. 51.

See *People v. Enoch*, 13 Wend. 159, per Walworth, Chancellor; *People v. M'Kinnon*, 1 Wheeler's C. C. 170.

(q) Against the form of the *statute* is sufficient, though the offence be prohibited by more than one statute. *Kane v. People*, 9 Wend. 203. By 2 Rev. Stat. p. 728, error in stating the conclusion is not fatal.

(r) The court should appear in the margin, so that the indictment may carry jurisdiction, though if it appear in the caption when the case goes up on error, it is enough. *State v. Zule*, 5 Halst. 348.

(44) *Pennsylvania. Commencement.*

In the Court of for the County of
Session, 184 .

The grand inquest of the Commonwealth of Pennsylvania,
inquiring for the upon their oaths and affirmations
respectively do present, etc.

(45) *Conclusion for common law offence.*

Against the peace and dignity of the Commonwealth of Penn-
sylvania.(s)

(46) *Conclusion for statutory offence.*

Contrary to the form of the act of assembly in such case
made and provided,(t) and against the peace and dignity of the
Commonwealth of Pennsylvania.

(47) *Delaware. Commencement.*

October Term, 1836. Kent County, ss.

The grand inquest for the State of Delaware and the body of
Kent County, on their oath and affirmation respectively, do
present, etc.

(48) *Conclusion for common law offence.*

Against the peace and dignity of the State.

(49) *Conclusion for statutory offence.*

Against the form of the act of the general assembly in such

(s) By the constitution, all prosecutions have to be carried on in the name and by the authority of the Commonwealth of Pennsylvania, and conclude "against the peace and dignity of the same." Art. v. s. 11. The proper conclusion is, "against the peace and dignity of the Commonwealth of Pennsylvania." *Com. v. Rogers*, 5 S. & R. 463; *Com. v. Jackson*, 1 Grant, 262.

(t) See *Warner v. Com.*, 1 Barr, 154; *Com. v. Searle*, 3 Binn. 332; *Russel v. Com.*, 7 S. & R. 489; *White v. Com.*, 6 Binn. 179; *Chapman v. Com.*, 5 Wh. 427. Where, however, to a common law offence there is a penalty attached, but the offence continues unchanged, the conclusion "*contra formam*," etc., need not be inserted; and this is even the case in an indictment for murder, though the common law offence is here divided into two partitions. *White v. Com.*, 6 Binn. 179.

When the termination "against the act," etc., is regularly inserted in a common law indictment, the courts will regard it as surplusage. *Pa. v. Bell*, Add. 171; *Res. v. Newell*, 3 Yeates, 407.

case made and provided,(u) against the peace and dignity of the State.(v)

(50) *Maryland. Commencement.*

Washington County, ss.

The jurors of the State of Maryland for the body of Washington County, on their oath present, etc.

(51) *Conclusion for common law offence.*

Against the peace, dignity, and government of the State.

(52) *Conclusion for statutory offence.*

Contrary to the form of the act of assembly in such cases made and provided(w) and against the peace, dignity, and government of the State.

(53) *Virginia. Commencement.*

Virginia, Lewis County, to wit:

The jurors for the Commonwealth of Virginia in and for the body of the County of Lewis, upon their oath present, etc.

(54) *Conclusion for common law offence.*

Against the peace and dignity of the Commonwealth.(x)

(55) *Conclusion for statutory offence.*

Contrary to the form of the statute in that case made and provided, and against the peace and dignity of the Commonwealth of Virginia.(y)

(u) "Against the form of the acts," etc., will not be vicious though only *one* act prohibits the offence. *Townley v. State*, 3 Harring. 377.

The statutory conclusion can always be rejected as surplusage. *State v. Craidly*, 3 Harring. 108.

(v) See *State v. Whaley*, 2 Harring. 538.

(w) *State v. Negro Jesse*, 7 Gill & J. 290. Where the punishment is prescribed by one act, and the offence prohibited by another, it is said the conclusion should be "against the acts" (*State v. Cassal*, 2 Harr. & Gill, 407); though the weight of authority is now the other way. *Supra*, p. 30.

(x) To omit this is fatal. *Com. v. Carny*, 4 Grat. 546; *Thompson v. Com.*, 20 Grat. 724. And so in West Virginia. *State v. Allen*, 8 W. Va. 680.

(y) See for this form, *Com. v. Daniels*, 2 Va. Cases, 402.

In case of misdemeanor it is said that though the name of the county be left blank in the margin, the deficiency will be made up by the statement of the county in the body of the indictment. *Teft v. Com.*, 8 Leigh, 721.

(61) *Conclusion for statutory offence.*

Against the form of the act of the general assembly of the said State(e) in such case made and provided, against the peace and dignity of the same State aforesaid.

(62) *Georgia. Commencement.*

Georgia.—Gwinnett County, ss.

The grand jurors sworn, chosen, and selected for the County of Gwinnett, in the name and in the behalf of the citizens of Georgia, on their oath present, etc.(f)

(63) *Conclusion for common law offence.*

Contrary to the good order, peace, and dignity of the said State.

(64) *Conclusion for statutory offence.*

Contrary to the laws of the said State, the good order, peace, and dignity thereof.

(65) *Alabama. Commencement.*

The State of Alabama, County. In Circuit Court, at term, 184 .

The grand jurors for the said State of Alabama, empanelled, sworn, and charged to inquire for the body of County, upon their oath present, etc.

(66) *Conclusion for common law offence.*

Against the peace and dignity of the State of Alabama.(g)

(67) *Conclusion for statutory offence.*

Contrary to the form of the statute in such case made and

that "against the peace and dignity of the same;" the Constitution prescribing the termination, "against the peace and dignity of the same." *State v. Yancey*. 1 Tr. Con. Rep. 237; *State v. Washington*, 1 Bay, 120.

(e) Unless the statute is merely declaratory of the common law, without adding to it or altering it, the conclusion should be, in all cases where a statute comes into play, "*contra formam*." *State v. Ripley*, 2 Brevard, 382.

(f) *Worcester v. State*, 6 Peters, 520.

(g) If the indictment concludes against the peace, etc., it is not necessary that each preceding count should so conclude. *McGuire v. State*, 37 Ala. 161.

provided, and against the peace and dignity of the State of Alabama.(h)

(68) *Mississippi. Commencement.*

The State of Mississippi,(i) County, ss.

In the Criminal Court (or Circuit Court) for County,
at the term thereof, in the year of our Lord one thousand eight hundred and forty-

The grand jurors for the State of Mississippi (taken from the body of the good and lawful men of County) elected, empanelled, and sworn to inquire in and for the said county of at the term of aforesaid (in the name and by the authority of the State of Mississippi),(j) upon their oath present, etc.

(69) *Conclusion for common law offence.*

Against the peace and dignity of the State of Mississippi.(k)

(70) *Conclusion for statutory offence.*

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the Commonwealth of Mississippi.

(71) *Louisiana. Commencement.*

The State of Louisiana, First Judicial District, ss. Parish of Orleans. Criminal Court of the First District.

The grand jurors for the State of Louisiana, duly empanelled and sworn, in and for the Parishes of Orleans, Jefferson, and Plaquemines, upon their oath present, etc.

(72) *Conclusion generally.*

Contrary to the form of the statute (of the State of Louis-

(h) See *State v. Williams*, 3 Stew. 454; *State v. Coleman*, 5 Port. 32.

(i) It is not essential that there should be a formal statement of a finding by authority of the State. It is enough if it appear from the record that the prosecution is in the State's name. *Greeson v. State*, 5 How. Miss. R. 33; *Woodside v. State*, 2 Ib. 33.

(j) The passages in brackets, though usual, can be omitted. *Woodside v. State*, 2 How. Miss. R. 655. See *Greeson v. State*, 5 How. Miss. R. 32.

(k) An indictment, beginning "State of Mississippi," and concluding "against the peace and dignity of the same," is sufficiently precise. *State v. Johnson*, 1 Walker, 392.

iana),(l) in such case made and provided, and against the peace and dignity of the same.(m)

(73) *Michigan. Commencement.*

State of Michigan. The Circuit Court for the County of Wayne, of the term of May, in the year of our Lord one thousand eight hundred and forty-

Wayne County, ss.

The grand jurors of the people of the State of Michigan, inquiring in and for the body of the County of Wayne aforesaid, upon their oath present, etc.

(74) *Conclusion for common law offence.*

Against the peace and dignity of the people of the State of Michigan.

(75) *Conclusion for statutory offence.*

Against the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan.

(76) *Ohio. Commencement.*

The State of Ohio, Franklin County, ss.

The Court of Common Pleas, Franklin County, Ohio, of the term of June, in the year of our Lord one thousand eight hundred and fifty-three.

The jurors of the grand jury of the State of Ohio, empanelled, sworn, and charged(n) to inquire of offences committed within

(l) The omission of this is not fatal. *State v. Korn*, 16 La. Ann. 183.

(m) "Against the peace," etc., when required by the Constitution, is essential. *State v. McCoy*, 29 La. Ann. 593.

Information. The State of Louisiana, First Judicial District, ss.

Criminal Court of the First District.

Christian Roselius, Attorney-General of the State of Louisiana, who, in the name and by the authority of the said State, prosecutes in this behalf, in proper person comes into the Criminal Court of the First District, at the City of New Orleans, on the day of , in the year of our Lord one thousand eight hundred and forty- , and gives the said court here to understand and be informed, etc., contrary to the form of the statute of the State of Louisiana, in such case made and provided, and against the peace and dignity of the same.

(n) It is not necessary that it should be averred in the indictment that the grand jury were empanelled and sworn to inquire within and for the body of

the said County of Franklin, in the name and by the authority of the State of Ohio, on their oaths do present and find.(o)

(77) *Conclusion for common law offence.*

Against the peace and dignity of the State of Ohio.(p)

(78) *Conclusion for statutory offence.*

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.(q)

(79) *Indiana. Commencement.*

State of Indiana, County of .

In the court, etc. (*setting out the same*), of term, 184 .

The grand jurors empanelled and sworn, etc., to inquire for the State of Indiana and the body of the County of V.,(r) upon their oath do present, etc.

(80) *Conclusion for statutory offence.*

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.(s)

(81) *Conclusion for common law offence.*

Against the peace and dignity of the State.

the county. "The law," it was said by the Supreme Court in this connection, "points out the duty of the grand jury; the law requires them to inquire within and for the body of the county, where they are empanelled, and for no other county; for here they are empanelled and sworn; therefore the law presumes the purpose, and it is not error, any more than it would be to omit to state their number, to omit an averment of the purpose for which they are empanelled, when they can under law be empanelled for no other purpose." *Ohio v. Hurley*, 6 Ohio R. 399.

(o) *Warren's C. L. 5.*

(p) As no common law offences are now recognized in Ohio, this conclusion, without the statutory averment, is obsolete and defective.

(q) See Const. art. 3, s. 12, where the same termination is prescribed as is given in the Constitution of Pennsylvania; as to construction of which, see ante, (44).

(r) See *State v. Kiger*, 4 Ind. 621; *Curtz v. State*, Ib. 385.

(s) Where the words "and dignity" were omitted, the court amended the indictment, on the motion of the prosecuting officer, by inserting them. *Cain v. State*, 4 Blackf. 512.

(82) *Illinois. Commencement.*

State of Illinois, County, ss.

Of the term of the Circuit Court in the year of our Lord one thousand eight hundred and forty- .

The grand jurors chosen, selected, and sworn in and for the county of in the name and by the authority of the people of the State of Illinois, upon their oaths present, etc.(t)

(83) *Conclusion for common law offence.*

Against the peace and dignity of the people of the State of Illinois.(u)

(84) *Conclusion for statutory offence.*

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said people of the State of Illinois.

(85) *Kentucky. Commencement.*

Commonwealth of Kentucky, County, ss.

The grand inquest of the Commonwealth of Kentucky, inquiring for the county of , on their oath present, etc.

(86) *Conclusion for common law offence.*

Against the peace and dignity of the Commonwealth of Kentucky.

(87) *Conclusion for statutory offence.*

Against the statute in such case made and provided, and against the peace and dignity of the Commonwealth of Kentucky.(v)

(t) See Bassett's Crim. Pl. 41.

(u) Zarresseller v. People, 17 Ill. 101.

(v) The conclusion "*contra formam*," etc., if improperly introduced, can always be treated as surplusage. Com. v. Gregory, 2 Dana, 103. Notwithstanding the constitutional provisions that all prosecutions should be carried on in the name and by the authority of the Commonwealth of Kentucky, it is not requisite that indictments should so conclude. Allen v. Com., 2 Bibb, 210: "When we threw off the regal government and adopted the republican form, it became necessary to provide that prosecutions should be carried on in the name and by the authority of the Commonwealth; but as under the regal, so under our present form of government, it is equally unnecessary that an indictment should expressly aver by what authority it is found and carried on. This in-

(88) *Tennessee. Commencement.*

State of Tennessee. Hardin County, Circuit Court,(w) November term, 1829.

The grand jurors of the State of Tennessee, elected, empanelled, sworn, and charged to inquire for the body of the County of Hardin, aforesaid, upon their oath present, etc.

(89) *Conclusion for common law offence.*

Against the peace and dignity of the State.(x)

(90) *Conclusion for statutory offence.*

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

(91) *Missouri. Commencement.*

State of Missouri, A. County, ss.

The Circuit Court, term, 184 .

The grand jurors for the State of Missouri for A. County, sworn to inquire,(y) upon their oath present, etc.

(92) *Conclusion for common law offence.*

Against the peace and dignity of the State.(z)

(93) *Conclusion for statutory offence.*

Contrary to the form of the statute in such case made and

dietment was, as all other indictments must be, carried on by the authority of the Commonwealth of Kentucky, and not by the authority of any other power; and that is alone what the Constitution requires."

The omission "of Kentucky," at all events, is not fatal. *Com. v. Young*, 7 B. Monroe, 1.

(w) It should appear in what court the indictment is found, so that it shall carry with it jurisdiction. *Dean v. State*, Mart. & Yerg. 127.

The grand jury must appear, from the whole record, to come from the county over which the court has jurisdiction. *Tipton v. State*, Peck's R. 8; *Cornell v. State*, Mart. & Yerg. 147.

(x) *State v. Barnes*, 5 Yerg. 187. The object of the conclusion "*contra formam*," etc., is to indicate to the court and the defendant that the offence and the penalty are statutory. *Crain v. State*, 2 Yerg. 390.

(y) See *State v. England*, 19 Mo. 386. "Sworn to inquire" is surplusage, though it is the practice to introduce it.

(z) An omission of this is fatal. *State v. Lopez*, 19 Mo. 254; *State v. Reaky*, 1 Mo. Ap. 3.

provided, and against the peace and dignity of the State of Missouri.(a)

(94) *Arkansas. Commencement.*

State of Arkansas, County, ss.
Court, etc., of term, 184 .

The grand jurors for the State of Arkansas, sworn and charged to inquire for the county of upon their oath present, etc.

(95) *Conclusion for common law offence.*

Against the peace and dignity of the State of Arkansas.(b)

(96) *Conclusion for statutory offence.*

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Arkansas.

(a) The indictment is usually signed "C. D., circuit attorney," though this, it seems, is unnecessary. *Thomas v. State*, 6 Miss. 457.

(b) The constitutional provision, that the conclusion shall be "against the peace and dignity of the State of Arkansas," will not be deviated from by the insertion of the words "the people of" before the State. *Anderson v. State*, 5 Pike, 445; *Buzzard v. State*, 20 Ark. 106. See *State v. Cadle*, 19 Ark. 613.

BOOK II.

CHAPTER I.

ACCESSARIES.(a)

- (97) Against accessory before the fact, together with the principal.
- (98) Against an accessory before the fact, the principal being convicted.
- (99) Against accessory after the fact with the principal.
- (100) Against an accessory after the fact, the principal being convicted.
- (101) Against accessory before the fact generally in Massachusetts.
- (102) Indictment against an accessory before the fact, in murder, at common law.
- (103) Against accessories before the fact in Massachusetts.
- (104) Against an accessory for harboring a principal felon in murder.
- (105) Against an accessory to a burglary after the fact.
- (106) Against principal and accessories before the fact, in burglary.
- (107) Against accessory before the fact to suicide. First count against suicide as principal in the first degree, and against party aiding him as principal in the second degree.
- (108) Second count against defendant for murdering suicide.
- (109) Against a defendant in murder who is an accessory before the fact in one county to a murder committed in another.
- (110) [For other forms of indictments against accessories in homicide, see post, 132, 156, etc.]
- (111) Larceny. Against principal and accessory before the fact.
- (112) Against accessory for receiving stolen goods.
- (113) Against accessory for receiving the principal felon.

(97) *Against accessory before the fact, together with the principal.*

(After charging the principal with the offence, and immediately before the conclusion of the indictment, charge the accessory thus):

(a) (*Who are accessories.—Time of trial and venue.*) See this subject considered in Wh. Cr. L. 8th ed. §§ 205 *et seq.* Where the parties are principals in the second degree as well as in fact they are in the first, they may be charged either way in one count; R. v. Crisham, C. & M. 187 (Maule, J., and Rolfe, B.); or both ways in different counts. See Wh. Cr. L. 8th ed. § 221; State v. McGregor, 41 N. H. 407; Com. v. Chapman, 11 Cush. 422; Com. v. Fortune,

And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., late of the parish aforesaid, in the county aforesaid, laborer, before the said (*felony and larceny, or felony and burglary*) was committed in form aforesaid, to wit, on the first day of August, in the year aforesaid, at the parish aforesaid, in the county aforesaid, did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command the said J. S. the said (*felony and larceny, or felony and burglary*) in manner and form aforesaid to do and commit.^(b) (*Conclude as in book 1, chap. 3.*)

105 Mass. 592; *State v. Hill*, 72 N. C. 345; *State v. Green*, 4 Strobb. 128; *State v. Davis*, 29 Mo. 391; *People v. Ah Fat*, 48 Cal. 61. Thus an indictment in its first count charged that Folkes ravished E., and that Ludds, at the time of committing the said felony and rape in form aforesaid, to wit, on, etc., with F. and A. at, etc., feloniously was present, aiding, abetting, and assisting Folkes the felony and rape to do and commit, against the peace, etc.; and in other counts Ludds was charged as principal and Folkes as aider; in others an "evil disposed person unknown" was laid as principal, and Folkes and Ludds as aiders; and Ludds was acquitted, Folkes convicted generally, it appearing that the latter, with three other men, had committed, at the same place and time, one after the other successively, rapes on E., the others aiding, etc., in turn. It was said that distinct offences, liable to distinct punishments, were charged, and that there was therefore a misjoinder; as 9 G. IV., c. 31, contained no specific provision against aiders and abettors in rape. It was held by the judges, on case reserved, that the conviction was good on the first count charging him as principal; and that on such an indictment several rapes on the same woman by prisoner and other men, each assisting the other in turn, might be proved without putting the Crown to elect on which count to proceed. Folkes' case, 1 Mood. C. C. 354. But in rape, an assistant, though present, can only be charged as principal in the second degree. Wh. Cr. L. 8th ed. §§ 553 a, 569.

An indictment against G. and W. charged in the first count W. as principal and G. as an aider, in the second it charged G. as principal and W. as aider (viz., as principal in second degree). Coleridge, J., refused a motion to quash the indictment for misjoinder. *R. v. Gray*, 7 C. & P. 164. See *R. v. Parry*, 7 C. & P. 836; Dickinson's Q. S. 6th ed. 293. Where, however, by statute, offences of the one class have a different punishment from that assigned to offences of the other class, then the indictments must be special. 1 East P. C. 348; *R. v. Home*, 1 Leach, 473. For other cases see Wh. Cr. L. 8th ed. § 221.

The acquittal of a party charged as principal in the first degree is no bar to the conviction of a party charged as principal in the second degree in the same indictment. And the principal in the second degree may be tried first. Wh. Cr. L. 8th ed. § 322.

(b) Mr. Archbold, in his note to this form, says: "The act of accessory before the fact is described in the several statutes creating new felonies, or punishing with death the principal and accessories in felonies at common law, in different terms. In prudence, perhaps, it will be better to pursue the words of the statute upon which the indictment is framed, in describing the offence of the accessory; but if the statute do not mention accessories, or in the case of a felony at common law, the words in the above form 'incite, move, procure,' etc., will be sufficiently indicative of the offence. And even where the statute does expressly describe the offence of accessory in terms, it is not absolutely necessary to describe it in the same terms in the indictment; a description in equivalent terms will be sufficient: thus, where the words in the statute were 'command, hire, or

(98) *Indictment against an accessory before the fact, the principal being convicted.*

Middlesex, to wit: The jurors for our lady the queen upon their oath present, that heretofore, to wit, at the general sessions of the delivery of the gaol of, etc. etc. (*so continuing the caption of the indictment against the principal*), it was presented upon the oaths of, etc., that one J. S., late of, etc. (*continuing the indictment to the end, reciting it, however, in the past, and not in the present tense*), upon which said indictment the said J. S., at the session of the gaol delivery aforesaid, was duly convicted of the (*felony and larceny*) aforesaid, as by the record thereof more fully and at large appears.(c)* And the jurors aforesaid, upon their oath aforesaid, do further present that J. W., late of the parish aforesaid, in the county aforesaid, laborer, before the said (*felony and larceny*) was committed in form aforesaid, to wit, on the first day of May in the year aforesaid, at the parish aforesaid, in the county aforesaid, did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command the said J. S. the said (*felony and larceny*) in manner and form aforesaid to do and commit; against the peace, etc. (*as in ordinary cases*).*(d)*

counsel,' and in the indictment, 'excite, move, and procure,' the indictment was holden good; because the words were of the same legal import. *R. v. Grevil*, 1 And. 195. A man may be indicted as accessory to one of several principals or to all, and if he be indicted as accessory to all, he may be convicted on such indictment as accessory to one or some of them. Lord Sanchar's case, 9 Co. 119; Fost. 361; 1 Hale, 624. An indictment charging that a certain evil disposed person feloniously stole certain goods, and that A. B. feloniously incited the said evil disposed person to commit the said felony, is bad against A. B. *R. v. Caspar*, 2 Mood. C. C. 101; 9 C. & P. 289." Accessories, Arch. C. P. 811; *cf.* Wh. C. L. 8th ed. §§ 205 *et seq.* 225.

(c) In setting out the indictment against the principal, it is not sufficient to allege that "at the sessions of gaol delivery, etc., it was presented," etc., without saying by whom, and on oath, etc. *R. v. Butterfield*, 2 M. & Rob. 522. As to the venue, see Arch. C. P. 815. As to recent statutes making the accessoryship before the fact an independent offence, see Wh. Cr. L. 8th ed. § 237.

Though at common law the accessory cannot be convicted until the principal has been convicted, it is not necessary to aver the principal's conviction in the indictment. *State v. Sims*, 2 Bail. S. C. 29; *State v. Evans*, *Ib.* 66; *Holmes v. Com.*, 25 Penn. St. 221; Wh. C. L. 8th ed. §§ 241, 244. For joint indictment, see *infra*, 102-3.

Under recent statutes, accessories before the fact may be charged as principals. *Cathcart v. Com.*, 37 Penn. St. 108; *Campbell v. Com.*, 84 Penn. St. 187; *Baxter v. People*, 3 Gilm. 368; *Dempsey v. People*, 47 Ill. 323; *Yoe v. People*, 49 Ill. 410; *State v. Zeibart*, 40 Iowa, 169; *Jorden v. State*, 56 Ga. 92; Wh. Cr. Pl. & Pr. 238.

(d) See Wh. Cr. L. 8th ed. §§ 226 *et seq.*

(99) *Indictment against accessory after the fact with the principal.*

(*After stating the offence of the principal, and immediately before the conclusion of the indictment, charge the accessory after the fact thus*): And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., late of the parish aforesaid, in the county aforesaid, laborer, well knowing (*e*) the said J. S. to have done and committed the said (*felony and larceny*) in form aforesaid, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, him the said J. S. did feloniously receive, harbor, and maintain. (*f*) (*Conclude as ante, book 1, chap. 3.*)

(100) *Indictment against an accessory after the fact, the principal being convicted.*

(*Proceed as in the precedent, supra, 98, to the asterisk; and then thus*): And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., late of the parish aforesaid, in the county aforesaid, laborer, well knowing the said J. S. to have done and committed the (*felony and larceny*) aforesaid, after the same was committed as aforesaid, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, him the said J. S. did feloniously receive, harbor, and maintain, against the peace, etc. (*as in ordinary cases*). (*g*)

(101) *Against accessory before the fact generally in Massachusetts.*

(*Charge the offence against the principal in the usual form, and proceed*): And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., of in the county of yeoman, before the said felony and murder (*or burglary, etc.*) was committed, in manner and form aforesaid, to wit, on at was accessory thereto before the fact, and feloniously and maliciously (*in murder say, "and of his malice aforethought," instead of maliciously*), did counsel, hire, and procure the said C. D. (*the principal*) the felony and murder aforesaid, in manner and form aforesaid, to do and commit; against the peace of said Commonwealth,

(*e*) This is essential. Wh. C. L. 8th ed. § 242.

(*f*) Arch. C. P. 817. See Wh. C. L. 8th ed. § 241.

(*g*) Arch. C. P. 820. An accessory cannot at common law be convicted on an indictment charging him as principal. Wh. C. L. 8th ed. § 245.

and contrary to the form of the statute in such case made and provided.^(h)

(102) *Indictment against an accessory before the fact, in murder, at common law.*

(*Frame the indictment against the principal in the usual form, alleging the nature of the murder, and then proceed as follows*): And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., of in the county of laborer, before the said felony and murder was committed, in form aforesaid, to wit, on the day of in the year of our Lord one thousand eight hundred and with force and arms, at in the county aforesaid, was accessory thereto before the fact, and did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command the said C. D. to do and commit the felony and murder aforesaid, in manner and form aforesaid.⁽ⁱ⁾ (*Conclude as in precedents for murder, infra.*)

(103) *Accessaries before the fact in Massachusetts.*

(*After alleging the murder against the principal, in the usual form upon the first section of the statute of Massachusetts, 1804, c. 123, § 1, the indictment proceeds*): And the jurors aforesaid, upon their oath aforesaid, do further present, that J. J. Knapp, of, etc., and George Crowninshield, of, etc., before the said felony and mur-

(h) The Rev. Stat. c. 133, §§ 1 and 2, provide: "Every person, who shall be aiding in the commission of any offence which shall be a felony, either at common law, or by any statute now made, or which shall hereafter be made, or who shall be accessory thereto before the fact, by counselling, hiring, or otherwise procuring such felony to be committed, shall be punished in the same manner, which is, or which shall be prescribed for the punishment of the principal felony.

"Every person, who shall counsel, hire, or otherwise procure any offence to be committed which shall be a felony, either at common law, or by any statute now made, or which shall hereafter be made, may be indicted and convicted as an accessory before the fact, either with the principal felon, or after the conviction of the principal felon; or he may be indicted and convicted of a substantive felony, whether the principal felon shall, or shall not have been convicted, or shall or shall not be amenable to justice; and in the last mentioned case may be punished in the same manner as being convicted of being an accessory before the fact." The statute is substantially re-enacted in the General Statutes.

The form in the text is based on the above statute, and is in conformity with those given by Mr. Davis under it. It is the same with that given by Train & Heard, p. 17.

(i) Cr. C. P. 124; 2 Chit. C. L. 5; Ib. 124.

der was committed, in manner and form aforesaid, to wit, on at were accessory thereto before the fact, and *feloniously, wilfully, and of their malice aforethought*, did counsel, hire, and procure the said J. J. Knapp (*the principal*) the felony and murder aforesaid, in manner and form aforesaid, to do and commit; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.(j)

(104) *Against an accessory for harboring a principal felon in murder.*

(*Frame the indictment, against the principal felon, according to the facts in the case, and in the usual form; then go on*): And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., late of in the county of laborer, well knowing the said C. D. to have done, committed, and perpetrated the felony and murder in manner and form aforesaid, afterwards, to wit, on the day of in the year of our Lord , with force and arms, at aforesaid, in the county aforesaid, was accessory thereto, and him the said C. D. did then and there feloniously receive, harbor, comfort, conceal, and maintain, etc.(k) (*Conclude as above.*)

(105) *Against an accessory to a burglary, after the fact.*

(*Draw the indictment against the principal according to the precedents in burglary (see "Burglary," post), and then proceed*): And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., of in the county of laborer, afterwards, to wit, on at well knowing the said C. D. to have done and committed the felony and burglary aforesaid, in manner and form aforesaid, him the said C. D. did then and there knowingly harbor, conceal, maintain, and assist.(l) (*Conclude as in book 1, chap. 3.*)

(j) This was the indictment, as we are informed by Mr. Davis, used against the accessories before the fact, in *Com. v. Knapp*, 9 Pick. 496. as principal, "in the horrid and most diabolical murder of Joseph White; upon which J. J. Knapp was tried, convicted, and executed. The words used in the English precedents are 'feloniously and maliciously counsel him,' etc., not using the allegation in the following precedent, 'feloniously, wilfully, and of their malice aforethought.' This indictment was drawn by the attorney-general of Massachusetts." Davis's Precedents, 41.

(k) 2 Stark. C. P. 456.

(l) Cro. C. P. 125.

(106) *Against principal and accessaries before the fact, in burglary.*

(*Draw the indictment against the principal according to the precedents in burglary (see "Burglary," post), and then proceed*): And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., of in the County of laborer, before the committing of the felony and burglary aforesaid, in manner aforesaid, to wit, on the day of in the year of our Lord one thousand eight hundred and at aforesaid, in the county aforesaid, was accessary thereto before the fact, and did feloniously and maliciously incite, move, counsel, hire, and procure, aid, abet, and command the said C. D. to do and commit the said felony and burglary, in manner and form aforesaid.(m) (*Conclude as in book 1, chap. 3.*)

(107) *Accessary before the fact to suicide. First count against suicide as principal in the first degree, and against party aiding him as accessary before the fact.(n)*

The jurors, etc., upon their oaths present, that C. D., of laborer, on the day of now last past, at aforesaid, in the county of aforesaid, in and upon himself did make an assault; and that he the said C. D., with a rope, about the neck of himself, the said C. D., then and there feloniously, wilfully, and of his malice aforethought did put, fasten, and bind; and that he the said C. D., with the said rope, about the neck of him the said C. D., then as aforesaid put, fastened, and bound, himself the said C. D. then and there feloniously, wilfully, and of his malice aforethought did choke and strangle; of which said choking and strangling the said C. D. then and there instantly died.

And so the inquest aforesaid, on their oath aforesaid, do say, that the said C. D., in manner and form aforesaid, himself, the said C. D., feloniously, wilfully, and of his malice aforethought did kill and murder, against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided. And that one E. F., late of said laborer, before the said self-murder, by the aforesaid C. D. in manner and form

(m) 3 Ch. C. L. 1101; Cro. C. P. 124.

(n) On this topic, see Wh. C. L. 8th ed. § 216. Persons abetting suicide are principals in murder. Ibid.

aforesaid done and committed, that is to say, on the day and year aforesaid, him the aforesaid C. D., at aforesaid, in the County of aforesaid, to do and commit the felony and murder of himself aforesaid, in manner and form aforesaid, maliciously, feloniously, voluntarily, and of his malice aforethought did stir up, move, abet, counsel, and procure, against the peace of the said commonwealth, and contrary to the form of the statute in such case made and provided.

(108) *Second count against defendant for murdering suicide.*

And the jurors aforesaid, on their oath aforesaid, do further present, that the said E. F., on the day and year aforesaid, at aforesaid, in the county aforesaid, in and upon the said C. D. did make an assault; and that he, the said E. F., a rope about the neck of the said C. D. then and there feloniously and of his malice aforethought did put, fasten, and bind; and that he, the said E. F., with the said rope about the neck of him the said C. D. then as aforesaid put, fastened, and bound, him the said C. D. then and there feloniously, wilfully, and of his malice aforethought did choke and strangle; of which choking and strangling he the said C. D. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said E. F., in manner and form aforesaid, him the said C. D. feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of the said commonwealth, and contrary to the form of the statute in such case made and provided.^(o)

(o) This is in general construction the same with the indictment in *Com. v. Bowen*, 13 Mass. 357. The deceased, a convict in the Northampton prison, being under sentence of death, the defendant, who was in an adjoining apartment, advised him the day before the intended execution to make away with himself, and thereby to elude the penalties of the law. The advice was taken, and, the experiment being successful, the defendant was indicted in the first count, as a principal in the second degree in the homicide, and in the second count, as its sole cause. The jury returned a verdict of not guilty, but in the charge of the chief justice no doubt is expressed that both the counts were proper. The law was declared to be, that if the persuasions of the defendant were the cause of the death of the deceased, the former was as much responsible for it as if he had himself struck the blow. See *R. v. Dyson*, R. & R. 523; *R. v. Russell*, 1 Moody C. C. 356; *R. v. Allison*, 8 C. & P. 418; *R. v. Fretwell*, 9 Cox C. C. 152; L. & C. 161; *Com. v. Dennis*, 105 Mass. 162; *Com. v. Mink*, 123 Mass. 422; *Blackburn v. State*, 23 Oh. St. 165.

(109) *Against a defendant in murder who is an accessory before the fact in one county to a murder committed in another.*(p)

That Robert Carliel, late, etc., and James Irweng, late, etc., as, etc., at, etc., not having the fear of God before their eyes but being moved and seduced by the instigation of the devil with force and arms, at aforesaid, in the county aforesaid, in and upon one John Turner, in the peace of God and our said lord the king, then and there being, feloniously and of their malice aforethought, did make an assault, and that the aforesaid Robert Carliel, with a certain gun, called a pistol, of the value of five shillings, then and there charged with gunpowder and one leaden bullet, which gun the said Robert Carliel, in his right hand, then and there had and held in and upon the aforesaid John Turner, then and there feloniously, voluntarily, and of his malice aforethought, did shoot off and discharge, and the aforesaid Robert Carliel, with the leaden bullet aforesaid, from the gun aforesaid, then and there sent out, the aforesaid John Turner, in and upon the left part of the breast of him the said John Turner, then and there feloniously struck, giving to the said John Turner then and there, with a leaden bullet as aforesaid, near the left pap of him the said John Turner, one mortal wound of the breadth of half an inch and depth of five inches, of which mortal wound the aforesaid John Turner, at London aforesaid, in the parish and ward aforesaid, instantly died; and that James Irweng feloniously, wilfully, and of his malice aforethought, then and there was present, aiding, assisting, abetting, comforting, and maintaining the aforesaid Robert Carliel to do and commit the felony and murder aforesaid, in form aforesaid; and so the aforesaid Robert Carliel and James Irweng, him the aforesaid John Turner, at London aforesaid,

(p) This, we are informed by Mr. Starkie, was the indictment used against Lord Sanchar, upon which he was convicted and executed. A full account of the proceedings upon that occasion appears in 9 Co. 117. It is observable, that though the indictment is founded upon the stat. 2 & 3 E. VI. c. 24, it does not conclude against the form of the statute, nor does this appear to be necessary; for though, before the statute, an accessory in one county to a murder in another, could not have been indicted in either, that was for want of the authority in the jurors to inquire, and the statute merely remedies the defect without making any alteration either in the nature of the offence or in the measure of punishment, which remained at common law. It was deemed necessary, says Mr. Starkie, expressly to allege the perpetration of the murder in the true county.

in the parish and ward aforesaid, in manner and form aforesaid, feloniously, voluntarily, and of their aforethought malice, killed and murdered; against the peace of our lord the now king, his crown and dignity; and that one Robert Creighton, late of the parish of St. Margaret, in Westminster, in the County of Middlesex, Esq., not having the fear of God before his eyes, but being seduced by the instigation of the devil, before the felony and murder aforesaid, by the aforesaid Robert Carliel and James Irweng, in manner and form aforesaid done and committed, that is to say, on the tenth day of May, in the tenth year of the reign of our lord James, by the grace of God, etc., the aforesaid Robert Carliel, at the aforesaid parish of St. Margaret, in Westminster, in the county of Middlesex aforesaid, (g) to do and commit the felony and murder aforesaid, in manner and form aforesaid, maliciously, feloniously, voluntarily, and of his aforethought malice, did stir up, move, abet, counsel, and procure, against the peace of our said lord the king that now is, his crown and dignity.

(110) [*For other forms of indictments against accessaries in homicide, see infra, book 3, chap. 1.*]

(111) *Larceny. Principal and accessory before the fact.*

That A. B., of in the county of laborer, on the day of in the year of our Lord one thousand eight hundred and at , one silver cup, of the value of ten dollars, of the goods and chattels of one C. D., then and there in the possession of the said C. D. being found, feloniously did steal, take, and carry away, against, etc.

And the jurors aforesaid, upon their oath aforesaid, do further present, that E. F., late of in the county of laborer, before the committing of the felony and larceny aforesaid, to wit,

(g) By stat. 4 & 5 Ph. & M. c. 4, all persons that shall maliciously command, hire, or counsel any person to commit petit treason, wilful murder, etc., every such offender being attainted or who shall stand mute, etc., or challenge peremptorily above twenty, etc., shall be excluded from the benefit of clergy. Though it is proper to introduce the words of the statute into the indictment, yet an indictment has been holden sufficient which wholly drops the words of the statute. Starkie, C. P. 421.

on the day of in the year last aforesaid, at afore-said, in the county aforesaid, did knowingly and feloniously incite, move, procure, aid, abet, counsel, hire, and command the said A. B. to do and commit the said felony and larceny, in manner and form aforesaid, against, etc. (r)

(112) *Against accessory for receiving stolen goods.*

(*State the offence against the principal felon as above, and then proceed as follows*):

And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., of in the county of laborer, afterwards, to wit, on the day of now last past, at B. aforesaid, in the county aforesaid, the goods and chattels aforesaid, to wit, one pair of shoes of the value of two dollars (*here state all the articles found upon the accessory, their value, etc.*), so as aforesaid feloniously stolen, taken, and carried away, by the said A. B., in manner aforesaid, feloniously did receive and have, and did then and there feloniously aid in concealing the same; he the said C. D. then and there well knowing the same goods and chattels to have been feloniously stolen, taken, and carried away as aforesaid, against, etc.(s)

(113) *Against accessory for receiving the principal felon.*

(*State the offence against the principal felon as in the next preceding precedent, and then proceed as follows*):

And the jurors aforesaid, upon their oath aforesaid, do further present, that C. D., of in the county of yeoman, well knowing the said A. B. to have done and committed the felony and larceny aforesaid, in manner and form aforesaid, afterwards, to wit, on the day of in the year of our Lord one thousand eight hundred and at B. aforesaid, in the county aforesaid, him the said A. B. did then and there knowingly and

(r) 2 Stark. C. P. ; Cro. C. C. 124 ; Davis's Prec. 36.

(s) 2 Stark. C. P. 457. This form is given by Mr. Davis, as good under the Massachusetts statute. Precedents, 38. When the principal has been convicted in one county, and the stolen goods received in another, the form will be the same as in this precedent, the conviction of the principal being alleged conformably to the record in the county where it was had. For precedents for the statutory offence of receiving stolen goods, see *infra*, 450 *et seq.*

feloniously receive, harbor, conceal, and maintain, in the larceny and felony aforesaid, against, etc.(t)

[*The only variation between indictments against accessaries to arson, mayhem, robbery, and rape, and the form given in the text, is that after the word felony, the phrase, "and arson," "and mayhem," "and robbery," "and rape," must be inserted as the case may require. For accessaries after the fact to larceny, see infra, 450 et seq.*]

[*For indictments against accessaries before the fact with unknown principals in abortion, see infra, 208, 210c.*]

(t) Davis's Precedents, 367 ; 2 Stark. C. P. 456 ; Cro. C. C. 124.

BOOK III.

OFFENCES AGAINST THE PERSON.

CHAPTER I.

HOMICIDE.(a)

- (114) General form of indictment.
- (115) Murder. By shooting with a pistol.
- (116) Murder. By cutting the throat.
- (117) Murder. Against principal in the first and in the second degree, for shooting with a pistol.
- (117*a*) Murder by pistol-shot in Massachusetts.
- (117*b*) Murder by pistol-shot under N. Y. statute, with counts varying in instrument.
- (117*c*) Murder by shot-gun under Indiana statute.
- (117*d*) Murder by shooting in Iowa.
- (117*e*) Information in Kansas for murder by shooting.
- (117*f*) Murder by shooting under Nevada statute.
- (118) Against principal in the first and principal in the second degree.
Hanging.
- (119) Second count. Against same. Beating and hanging.
- (120) Murder. Striking with a poker.
- (121) Murder. By riding over with a horse.
- (122) Murder. By drowning.
- (123) Murder. By strangling.
- (124) Second count. By strangling and stabbing with unknown persons.
- (125) Murder. By burning a house where the deceased was at the time.
- (126) Second count. Averring a preconceived intention to kill.
- (127) Murder. First count, by choking. Against two—one as principal in the first degree, and the other in the second degree.
- (128) Second count, by choking and beating. Against two—one as principal in the first degree, the other in second degree.

(a) See in full Wh. Cr. L. 8th ed. §§ 303 *et seq.*

HOMICIDE.

- (129) Murder. By poisoning with arsenic.
- (130) Murder by poisoning. First count, with arsenic in chicken soup.
- (131) Second count. Against one defendant as principal in the first, and the other as principal in the second degree.
- (132) Third count. Against one as principal and the other as accessory before the fact.
- (133) By placing poison so as to be mistaken for medicine.
- (134) Murder of a child by poison.
- (135) By mixing white arsenic with wine, and sending it to deceased, etc.
- (136) Murder by poisoning. First count, mixing white arsenic in chocolate.
- (137) Second count. Mixing arsenic in tea.
- (138) Murder by giving to the deceased poison, and thereby aiding her in suicide.
- (138a) Murder by administering cantharides.
- (139) Murder in the first degree in Ohio. By obstructing a railroad track.
- (140) Murder in the first degree in Ohio. By sending to the deceased a box containing an iron tube, gunpowder, bullets, etc., artfully arranged so as to explode on attempting to open it.
- (141) Murder in the first degree in Ohio. By a father, chaining and confining his infant daughter several nights during cold weather without clothing or fire.
- (142) Second count. Not alleging a chaining.
- (142a) By stabbing, under Ohio statute.
- (143) By forcing a sick person into the street.
- (144) Murder of an infant by suffocation.
- (145) Murder by stamping, beating, and kicking.
- (146) Murder by beating with fists and kicking on the ground, no mortal wound being discovered.
- (147) For stabbing, casting into the sea, and drowning the deceased on the high seas, etc.
- (148) Knocking to the ground, and beating, kicking, and wounding.
- (149) Murder by striking with stones.
- (150) Murder by casting a stone.
- (151) Murder by striking with a stone.
- (152) By striking with an axe on the neck.
- (153) By striking with a knife on the hip, the death occurring in another State.
- (155) Murder by stabbing with a knife.
- (156) Murder. Against J. T. for shooting the deceased, and against A. S. for aiding and abetting.
- (156a) Murder in producing abortion.
- (157) Murder of a bastard child.
- (157a) Same under Maine statute.
- (158) Throwing a bastard child in a privy.
- (159) Smothering a bastard child in a linen cloth.
- (160) Murder, in Pennsylvania, of a bastard child by strangling.
- (161) Murder. By starving apprentice.

OFFENCES AGAINST THE PERSON.

- (162) Manslaughter by neglect. First count, that the deceased was the apprentice of the prisoner, and died from neglect in prisoner to supply him with food, etc.
- (163) Second count, charging killing by overwork and beating.
- (163a) Homicide of wife by neglect to provide necessaries.
- (164) Manslaughter. Against a woman for exposing her infant child so as to produce death.
- (165) Manslaughter. By forcing an aged woman out of her house in the night, tarring, feathering, beating, and whipping her.
- (166) Against the keeper of an asylum for pauper children, for not supplying one of them with proper food and lodging, whereby the child died.
- (167) Manslaughter, by striking with stone.
- (168) Manslaughter. By giving to the deceased large quantities of spirituous liquors, of which he died.
- (169) Against driver of a cart for driving over deceased.
- (170) Manslaughter. Against a husband for neglecting to provide shelter for his wife.
- (171) Murder, in a duel fought without the State. Rev. Sts. of Mass. ch. 125, § 3.
- (172) Manslaughter in second degree against captain and engineer of a steamboat, under New York Rev. Statute, p. 531, § 46.
- (173) Against the engineer of a steamboat for so negligently managing the engine that the boiler burst and thereby caused the death of a passenger.
- (174) Against agent of company for neglecting to give a proper signal to denote the obstruction of a line of railway, whereby a collision took place and a passenger was killed.
- (175) Against the driver and stoker of a railway engine, for negligently driving against another engine, whereby the deceased met his death.
- (176) Involuntary manslaughter in Pennsylvania, by striking an infant with a dray.
- (177) Murder on the high seas. General form as used in the United States courts.
- (177a) Murder by shooting on high seas.
- (178) Murder on the high seas, by striking with a handspike. Adapted to United States courts.
- (179) Striking with a glass bottle, on the forehead, on board an American vessel in a foreign jurisdiction. Adapted to United States courts.
- (180) Against a mother for drowning her child, by throwing it from a steamboat on Long Island Sound.
Second count. Omitting averment of relationship, and charging the sex to be unknown.
- (181) Murder on the high seas, with a hatchet.
- (182) Manslaughter on the high seas.
Second count. Same on a long-boat belonging to J. P. V., etc.

(183) Misdemeanor in concealing death of bastard child by casting it in a well, under the Pennsylvania statute.

(184) Same, where means of concealment are not stated.

(185) Endeavor to conceal the birth of a dead child under the English statute.

(114) *General Form of Indictment.*

That A. B.,^(b) late of the parish of C., in the county of P., laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil,^(c) on, etc., with force and arms,^(d) at the parish aforesaid,^(e) in and upon one E. F.,^(f) in the peace of God and of the said commonwealth then and there being,^(g) feloniously, wilfully, and of his malice aforethought,^(h) did make an assault;⁽ⁱ⁾ and that he the said A. B., with a certain knife^(j) of the value of sixpence,^(k) which he the said A. B. in his right hand then and there had and held,^(l) him,^(m) the said E. F., in and upon the left side of the breast of him the said E. F.,⁽ⁿ⁾ then and there^(o) feloniously,^(p) wilfully, and of his malice aforethought,^(q) did strike,^(r) giving to the said E. F., then and there, with the knife aforesaid,^(s) by the stroke aforesaid, in manner aforesaid, in and upon the said left side of the breast of him^(t) the said E. F., one mortal wound of the breadth of three inches, and of the depth of six inches;^(u) of which said mortal wound the said E. F., from the said third day of August, in the year aforesaid, until the fifteenth day of the same month of August, in the year aforesaid, at the parish aforesaid, did languish, and languishing did live;^(v) on which said fifteenth day of August, in the year aforesaid, the said E. F., at the parish aforesaid, in the county aforesaid,^(w) of the wound aforesaid, died;^(x) and so the jurors aforesaid, upon their oath aforesaid, do say that the said A. B., him the said E. F.,^(y) in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought,^(z) did kill and murder.^(a) (*Conclude as in book 1, chap. 3.*^(b))

(b) As the distinction between principal in the first and principal in second degree is only artificial, a principal in the second degree may be convicted though indicted as a principal in the first degree, and *vice versa*. Supra, notes to 97 *et seq.*; Wh. Cr. L. 8th ed. § 521; Wh. Cr. Ev. § 102.

An agent's act, when such agent is the instrument of the principal's purpose, may be laid as the principal's act. Wh. Cr. L. 8th ed. § 522.

An averment, however, that the defendant was principal, cannot be supported

at common law, by proof that he was accessory before the fact. *R. v. Soares*, R. & R. 25; *R. v. Fallon*, 9 Cox C. C. 242; *State v. Wyckoff*, 2 Vroom, 65; *Hughes v. State*, 12 Ala. 458; *Josephine v. State*, 39 Miss. 613. But under recent statutes, accessories before the fact may be charged as principals. Wh. Cr. L. 8th ed. § 522; see cases cited, *supra*, to 97.

(c) These words are unnecessary. If included they are rejected as surplusage; if excluded the want of them is not the subject of exception.

It is not necessary to aver the defendant to be of sound mind. *Fahnestock v. State*, 23 Ind. 231.

(d) "Force and arms." The use of these words is unnecessary; and in one instance, the omission of them in an indictment for murder has been expressly sanctioned. *Terr. v. M'Farlan*, 1 Mart. 16, and cases cited, *supra*, in notes to book 1, chap. 2.

(e) This averment must be so made as to bring the facts within the jurisdiction. See authorities cited in Wh. Cr. L. 8th ed. § 512.

The conflict in cases where the blow is struck in one State and the death is in another is discussed in Wh. Cr. L. 8th ed. §§ 289-292.

Where the indictment charged that the defendant, late of B. County, "at the county aforesaid," etc., it was held that this was sufficient to point out the place where the offense was committed. *State v. Lamon*, 3 Hawkes, 175.

(f) In what way the name of the party injured must be set forth, has been already discussed. Notes to book 1, ch. 2; Wh. Cr. Pl. & Pr. § 96. When an officer is killed in execution of his office, his special official station need not be stated. *R. v. Mackally*, 9 Co. R. 68; *Boyd v. State*, 17 Ga. 194; *Wright v. State*, 18 Ga. 383. But when the case rests on a peculiar relationship, *e. g.*, on the duty to supply necessities to an infant, this relationship must be stated. *R. v. Waters*, 2 C. & K. 862; *R. v. Goodwin*, 1 Russ. C. & M. 563.

(g) These words do not need proof, and may be omitted without prejudice. *Arch. C. P.* 10th ed. 407; *Com. v. Murphy*, 11 Cush. 492. As to meaning of words, see Wh. C. L. 8th ed. § 310.

(h) These words have always been held necessary (Wh. Cr. L. 8th ed. § 518); if the qualification of "malice aforethought" be omitted, the offence drops to manslaughter. In Arkansas, however, it would seem a conviction of murder can rest on an indictment where malice aforethought is not charged (*Anderson v. State*, 5 Pike, 445); and in Iowa it is said to be enough to aver "feloniously, intentionally, wilfully, maliciously, and deliberately." *State v. Neeley*, 20 Iowa, 108.

In Ohio, it is better to aver an intent to kill or murder, and certainly to repeat the words of the statute, requiring that the act be done "purposely and of deliberate malice." See post, 139.

As to scienter in poisoning, see *infra*, 130.

The question of variance in cases where the intent is to kill A., but the blow falls on B., is discussed in Wh. Cr. L. 8th ed. § 514.

How far the statutory terms as to intent must be followed, is discussed in Wh. Cr. L. 8th ed. § 393. See, also, last notes to this form.

(i) As to this allegation, see Wh. C. L. 8th ed. § 518. The "assault" is omitted in indictments for negligent homicides without violence. *R. v. Plummer*, 1 C. & K. 600; *R. v. Hughes*, 7 Cox C. C. 301; *R. v. Friend*, R. & R. 20. But the assault may, in any view, be rejected as surplusage. *R. v. Ellis*, 2 C. & R. 470.

(j) The common law rule in pleading the instrument of death is, that where the instrument laid and the instrument proved are of the same nature and character, there is no variance; where they are of opposite nature and character, the contrary. Wh. Cr. L. 8th ed. § 519, and cases there cited. Thus evidence of a dagger will support the averment of a knife, but evidence of a knife will not support the averment of a pistol. An illustration of this distinction is found in *Com. v. Haines*, 6 Pa. L. J. 232; Wh. Cr. Ev. § 91. The defendant was charged with having erected a stuffed *Paddy* with intent to libel the *Catholic* Irish; and he endeavored to defend himself by proof that the device was a stuffed

Shelah, and the object was to annoy the *Protestant Irish*. The instructions of the court were invoked as to whether there was a variance; and Gibson, J., said that if there was a mere averment of a Paddy, and evidence of a *Shelah*, the object and character of the figures being similar, there was no variance; but that if, on the contrary, they were devices of an antagonistic character, the indictment could not be supported. Where the method of operation is the same though the instrument is different, no variance exists; where the former is not the case, the rule is otherwise. The same reasoning applies to indictments for homicide. *Wh. Cr. Ev.* §§ 92-8. Where the species of death would be different, as if the indictment allege a stabbing or shooting, and the evidence prove a poisoning or starving, the variance is fatal (*R. v. Briggs*, 1 Mood. C. C. 318): and the same if the indictment state a poisoning, and the evidence prove a starving. Thus where an indictment stated that the defendant assaulted the deceased, and struck and beat him upon the head, and thereby gave him divers mortal blows and bruises, of which he died, and it appeared in evidence that the death was by the deceased falling on the ground, in consequence of a blow on the head received from the defendant; it was holden that the cause of the death was not properly stated. *R. v. Thompson*, 1 Mood. C. C. 139; *Wh. Cr. Ev.* § 91. But if it be proved that the deceased was killed by any other instrument, as with a dagger, sword, staff, bill, or the like, capable of producing the same kind of death as the instrument stated in the indictment, the variance will not be material. *R. v. Mackally*, 9 C. 67 a; *Gilb. Ev.* 231; *R. v. Briggs*, 1 Mood. C. C. 318, and cases cited in *Wh. C. L.* 8th ed. § 519. So if the indictment allege a death by one kind of poison, proof of a death by another kind of poison will support the indictment. *Ib.*; and see 2 Hale, 115, 185; 2 Hawk. c. 23, s. 84. An indictment having charged that the prisoner, with both her hands about the neck of the deceased, the neck and throat of the deceased did squeeze and press, and by such squeezing, etc., did suffocate and strangle the deceased; and the evidence being that the prisoner suffocated the deceased by placing one hand on his mouth and the other on the back of his head; *Patteson, J.*, held that it was sufficient if the death was caused by suffocation, and that the evidence supported the indictment. *R. v. Culpin*, 5 C. & P. 121. And in another case the offence being charged to have been committed with a certain sharp instrument, and the evidence was that the wound was partly torn and partly cut, and was done with an instrument not sharp, *Parke, B.*, held the indictment proved, and said the degree of sharpness was immaterial. *R. v. Grounsell*, 7 C. & P. 788. And where an indictment for the murder of a bastard child stated that the defendant forced and thrust moss and dirt into its throat, mouth, and nose, and that by forcing and thrusting the moss and dirt into the throat, mouth, and nose of the child, the child was choked, etc., and it appeared that the child was not immediately suffocated by the moss and dirt, but that the moss and dirt caused an injury and inflammation in the throat, which closed the passage to the lungs and stomach, of which the child died; it was declared that the evidence supported the indictment, and that it was sufficient to state the proximate cause of the death, without stating the intermediate process resulting from that proximate cause. *R. v. Tye, R. & R.* 345. Where the prisoner was indicted for cutting the throat of the deceased, and a surgeon proved that what was technically called the throat was not cut, as the wound did not extend so far round the neck, *Patteson, J.*, held that the indictment must be understood to mean what is commonly called the throat. *R. v. Edward*, 6 C. & P. 401. Where the indictment alleged that the defendant suffocated the deceased by placing her hand on the mouth of the deceased, and the jury found that the death was caused by suffocation, but could not say how it was occasioned, *Denman, C. J.*, held the indictment proved. *R. v. Waters*, 7 C. & P. 250. But under an indictment for shooting with a pistol loaded with gunpowder and a leaden bullet, it appeared that there was no bullet in the room where the act was done, and no bullet in the wound; and it was proved that the wound might have been occasioned by the wadding of the pistol, *Bolland, B., Park and Parke, J.*, held the indictment not proved. *R. v. Hughes*, 5 C. & P. 126. "Shooting" is not sustained by proof

of striking with a gun. *Guedel v. People*, 43 Ill. 226. The same principle was applied where an indictment charged that the defendant struck the deceased with a brick, and it appeared that he knocked the deceased down with his fist, and that the deceased fell upon a brick which caused his death. *R. v. Kelly*, 1 Mood. C. C. 113. See to same effect, *State v. Jenkins*, 14 Rich. (S. C.) 215. In New York a far more liberal rule has been announced, it having been substantially held that the use of a pistol might be proved under an indictment charging the weapon to have been a knife. *People v. Colt*, 3 Hill, 432. See generally Wh. C. L. 8th ed. § 519.

In most States, it is now by statute unnecessary to state the instrument of death. These statutes, however, do not apply to cases of death caused by neglect, or by fright induced by the defendant's misconduct, without any particular physical instrument of injury being used. In such cases, as well as at common law, the indictment must set forth the special facts. See *R. v. Pitts*, 1 C. & M. 284; *R. v. Waters*, 6 C. & P. 328; *State v. Morrissey*, 70 Me. 401, and cases detailed in Wh. Cr. L. 8th ed. § 519 *et seq.*; *infra*, 156a.

It is enough to aver, under any circumstances, that the assault was made "by some means, instruments, and weapons, to the jurors unknown." Wh. C. Ev. § 93; *State v. Wood*, 53 N. H. 484; *State v. Burke*, 54 N. H. 92; *Com. v. Webster*, 5 Cush. 295; *State v. Williams*, 7 Jones N. C. 446; *People v. Cronin*, 34 Cal. 191; *People v. Martin*, 47 Cal. 96. See also *Com. v. Martin*, 125 Mass. 394.

(k) The allegation of value is now immaterial, and need not be proved. In England, where deodands are still recognized, it may be necessary to introduce it; though the same object does not exist in this country. In the edition of Hale's Pleas of the Crown, by Messrs. Stokes and Ingersoll, i. 424, will be found an interesting and curious exposition of the law of deodands.

(l) Though the hand in which the instrument was held is set out in the old forms, it is clearly not necessary to prove it. Arch. C. P. 10th ed. 407; Wh. C. L. 8th ed. § 528; *Com. v. Costley*, 118 Mass. 1; *Coates v. State*, 72 Ill. 308.

(m) The "him" which is here inserted is not usually introduced; and in several cases counts have been sustained without it, where the express exception was taken. *Com. v. White*, 6 Binn. 183. The insertion, however, adds to perspicuity.

(n) The old practice was to state in what part of the body the deceased was wounded; and, therefore, if it be said that the wound was on the arm, hand, or side, without saying whether the right or the left, it is bad. 2 Hale, 185; *contra*, *Whelchell v. State*, 23 Ind. 89. If, however, the wound be stated to be on the left side, and proved to be on the right, or alleged to be on one part of the body, and proved to be on another, the variance is immaterial. 2 Hale, 186. "Upon the body" is now a sufficient averment. *Sanchez v. People*, 8 E. P. Smith, 147; *Whelchell v. State*, 23 Ind. 89; *Thompson v. State*, 36 Tex. 326. See, for other cases, Wh. C. L. 8th ed. § 532.

(o) The time need not be formally repeated; "then and there" carries the averment back to the original date. *Stout v. Com.*, 11 S. & R. 177. Even if the "then and there" be omitted, it would seem that the court will still give judgment on the indictment if the grammatical construction be such as to apply the time at the outset to the subsequent allegations. *State v. Cherry*, 3 Murph. 7. But where two distinct periods have been averred, the statement "then and there" is not enough; one particular time should be averred. *Storrs v. State*, 3 Miss. 45. See *supra*, note on time to book 1, ch. 2.

(p) See, as to the repetition of "feloniously," Wh. Cr. Pl. & Pr. § 260.

(q) The repetition of this phrase in this place has been held to be unnecessary in North Carolina (*State v. Owen*, 1 Murph. 452), though it is safer to introduce it. *Resp. v. Honeyman*, 2 Dall. 228.

(r) Wherever death is caused by physical violence, it is proper that the indictment should allege that the defendant struck the deceased. See 5 Co. 122 a; 2 Hale, 184; 2 Hawk. c. 53, s. 82; Wh. C. L. 8th ed. § 530; *Edmondson v. State*, 41 Tex. 496; and this must also be proved, though in Virginia it has

been ruled that where the instrument was a dagger, "stab, stick, and thrust," would be held equivalent to strike. *Gibson v. Com.*, 2 Va. Cases, 111. It is not necessary, however, to prove that he struck him with the particular instrument mentioned in the indictment; and therefore, although the indictment allege that the defendant did strike and thrust, proof of a striking which produced confused wounds only would maintain the indictment. *Arch. C. P.* 10th ed. 486.

"Firing" is a variance from "shooting;" *Shepherd v. State*, 54 Ind. 25; and so, as we have seen, is "striking;" *Guedel v. People*, 43 Ill. 226. Where "strike" is not the appropriate term, the mode of injury must be specially described. *R. v. Webb*, 2 Lew. 196; 1 M. & Rob. 405; *R. v. Tye*, R. & R. 345.

Where the indictment charges that A. struck, etc., and B. abetted, it is no variance, if it appear that B. struck and A. abetted. *State v. Cockman*, 1 Wins. (N. C.) No. 2, 95. *Supra*, notes to book 1, chap. 3.

(s) The indictment must distinctly state that the blow was struck by the instrument alleged. An indictment, however, charging "that A. B. with a certain stick, etc., in and upon the head and face of C. D. then and there did strike and beat, giving to the said C. D. then and there, with the stick aforesaid, in and upon the head and face of the said C. D., several mortal wounds, of which said several mortal wounds the said C. D. instantly died," is good; for there is in the first clause a direct allegation of a stroke, and the particle *giving*, and the words *then and there*, connect the allegation with the mortal wound in the second clause. *Gibson v. Com.*, 2 Va. Cases, 111. Where the allegation was, "that the prisoner in and upon M. F., etc., feloniously, etc., did make an assault with a certain gun, called a rifle gun, etc., then and there charged with gunpowder and two leaden bullets, which said gun he, etc., had and held, at and against the said M. F., then, etc., feloniously, etc., did shoot off and discharge, and that the said M. F., with the leaden bullets aforesaid, by means of shooting off and discharging the said gun, so loaded, to, at, and against the said M. F., as aforesaid, did, etc., feloniously, etc., strike, penetrate, and wound the said M. F., in and upon the left side of the said M. F., etc., giving to her the said M. F., etc., with the leaden bullets aforesaid, by means of shooting off and discharging the said gun, so loaded, to, at, and against the said M. F., and by such stricken, etc., the said M. F., as aforesaid, one mortal wound in and upon the left side of the said M. F.," etc.; on a motion to arrest the judgment, on the ground that there was no sufficient averment that the gun was shot off, or that the contents were discharged, it was said that the inference seemed to be one of absolute certainty, that the contents of the gun were shot off and discharged, for there was nothing else to which the words "did shoot off and discharge" with a gun charged with gunpowder and leaden bullets, could be applied. *State v. Freeman*, 1 Spears, 57.

(t) The insertion of the pronoun "him" at this place, though not usual, tends to help the grammatical construction.

(u) The wound must be alleged to have been "mortal," and death therefrom must be distinctly averred. Wh. C. L. 8th ed. § 536. As to causal relation see *ibid.* As to special meaning of the term "wound," see Wh. Cr. L. 8th ed. § 533. Whatever once may have been thought, it is now settled that it is not necessary to state, in an indictment for murder, the length, breadth, or depth of the wound. *R. v. Mosely*, 1 Mood. C. C. 97; *Com. v. Woodward*, 102 Mass. 155; *West v. State*, 48 Ind. 483. And of a "bruise" no dimensions need be given. *Turner's Case*, 1 Lew. 177; *State v. Owen*, 1 Murph. 452. And so as to incised wounds. *State v. Conley*, 39 Me. 78; *Com. v. Chapman*, 11 Cush. 422; *Dillon v. State*, 9 Ind. 122; *Lazier v. Com.*, 10 Grat. 708; *Smith v. State*, 43 Tex. 643. But some kind of wound, in cases of this class, must be averred. It is not enough, for instance, to aver that the death of an infant was caused by "ravishing." *R. v. Lad*, 1 Leach, 38; 1 C. & M. 345.

(v) The allegation of languishing, though it may be proper in the cases where there actually is an intermission between the blow and the death, may be rejected as surplusage in all others. *Penn. v. Bell*, Add. 171, 175; *State v. Conley*, 39 Me. 78.

(w) See 3 Ch. C. L. 735; Bac. Abr. Tit. Indict. s. 4. That this is necessary at common law, see Wh. C. L. 8th ed. § 358.

(x) The dates here stated in the indictment need not be proved as laid, though an indictment upon which it does not appear that the death happened within a year and a day after the wound was given, is fatally defective; because when the death does not ensue within a year and a day after the wound is inflicted, the law presumes that it proceeded from some other cause. *State v. Orrell*, 1 Dev. 139; *People v. Aro*, 6 Cal. 207; *Edmonson v. State*, 41 Tex. 496. All that is necessary to be proved, in order to support this part of the indictment, is, that the deceased died of the wound or wounds given him by the defendant, within a year and a day after he received them; as otherwise the case is not made out. 1 Haw. c. 23, s. 90. Where it appeared that the man's death was caused by improper applications to the wound, and not by the wound itself, the defendant is not responsible; though if a man be wounded, and the wound turn to a gangrene or fever for want of proper applications, or from neglect, and the man die of the gangrene or fever; or if it become fatal from the refusal of the party to undergo a surgical operation (*R. v. Holland*, 2 M. & Rob. 351), this is homicide, and murder or not, according to the circumstances under which the wound was given. 1 Hale, 421. An indictment against two defendants, which states the death to be the result of two different injuries inflicted by each of the defendants separately, on different days, is bad. *R. v. Devett*, 8 C. & P. 639. The date of death must be distinctly averred. *State v. Conley*, 39 Me. 78; *Lester v. State*, 9 Mo. 658; *State v. Mayfield*, 66 Mo. 125; Wh. C. L. 8th ed. §§ 536-7. "Immediately" will not suffice. *State v. Testerman*, 68 Mo. 408; Wh. Cr. Pl. & Pr. § 132; nor "instantly" without "then and there." *R. v. Brownlow*, 11 A. & E. 119; *State v. Lakey*, 65 Mo. 217; *State v. Steeley*, 65 Mo. 218. But the averment "killed" on a certain day involves death on that day. *State v. Ryan*, 13 Minn. 371. The term "then and there" has been considered in the notes to book 1, ch. 2. *Variance* as to these dates is not fatal. Wh. Cr. Pl. & Pr. § 139; *State v. Haney*, 67 N. C. 467.

(y) In Michigan, the omission of this averment was held not fatal, after conviction of manslaughter. *Evans v. People*, 12 Mich. 27.

(z) This repetition is necessary. *State v. Heas*, 10 La. R. 195.

(a) The second count of indictment for murder charged J. O. B. that he, "on the 27th of May, feloniously, and of his malice aforethought, struck the deceased with a stick, of which said mortal wound the deceased died on the 29th of May; that T. R., D. D., etc., on the day and year first aforesaid, at the parish aforesaid, feloniously, and of their malice aforethought, were present aiding and abetting the said J. O. B. the felony last aforesaid to do and commit;" and concluding, "the jurors, etc., say that the said J. O. B., T. R., D. D., etc., him the deceased, in manner and form last aforesaid, feloniously, and of their malice aforethought, did kill and murder." The third count charged T. R. that he, "on the 27th day of May, a certain stone feloniously, and of his malice aforethought, cast and threw, and which said stone, so cast and thrown, struck deceased, of which mortal blow the deceased died on the 29th of May; and that J. O. B., D. D., etc., were present, aiding and abetting," etc., as in the first count. It was objected, 1st, that the indictment was inconsistent, in charging the principals in the second degree with committing the felony at the time of the stroke, whereas it was no felony till the time of the death; and, 2d, that the general verdict of guilty left it uncertain which was the cause of death, the stick or the stone, and that therefore no judgment could be entered on either. It was held, 1st, that the form of the indictment was good; and, 2d, that the alleged generality was immaterial, the mode of death being substantially the same. *R. v. O'Brian*, 1 Den. C. C. 9.

If several be charged as principals, one as principal perpetrator, and the others as present, aiding and abetting, it is not material which of them be charged as principal in the first degree, as having given the mortal blow, for the mortal injury done by any one of those present is, in legal consideration, the injury of each and every one of them. *Fost.* 551; 1 East, P. C. 350; *State v. Fley*

(115) *Murder. By shooting with a pistol.(c)*

That A. B., of, etc., yeoman, on with force and arms, at
 in the county aforesaid, in and upon the body of one C. D.,
 in the peace of said commonwealth then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said A. B., a certain pistol, of the value of two dollars, then and there charged with gunpowder and one leaden bullet, which said pistol, he the said A. B. in his right hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought did discharge and shoot off, to, against, and upon the said C. D.; and that the said A. B. with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said A. B. discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him the said C. D. in and upon the right side of the belly of him the said C. D., giving to him the said

& Rochelle, 2 Brev. 338; *State v. Mair*, 1 Coxe, 453. See notes to book 1, ch. 2, *supra*.

Where the deceased was killed by a riotous attack, it is not necessary to aver such riot, but every participant is chargeable with the guilty blow, though he may not have struck it himself. *State v. Jenkins*, 14 Rich. (S. C.) 215. See *supra*, note to forms 97, 114.

If the actual perpetrator of a murder should escape by flight, or die, those present, abetting the commission of the crime, may be indicted as principals; and though the indictment should state that the mortal injury was committed by him who is absent, or no more, yet if it be subsequently alleged that those who are indicted were present at the perpetration of the crime, and did kill and murder the deceased, by the mortal injury so done by the actual perpetrator, it will be sufficient. *State v. Fley*, 2 Brev. 338.

(b) In New York, though a common law indictment for murder will bring the case within the statutory felony, yet there can be no conviction under it unless the offence comes up to the grade assigned by the statute to a felonious and intentional homicide. *People v. Enoch*, 18 Wend. 159.

In Pennsylvania, *Com. v. White*, 6 Binn. 183, and in North Carolina, *State v. Duncley*, 3 Iredell, 117 (*infra*, 153), the statutory conclusion is unnecessary, and on an indictment concluding as at common law, the statutory punishment may be inflicted. The averments of malice in a common law indictment for murder will sustain a verdict of murder in the first degree in Maine, New Hampshire, Massachusetts, New York, Pennsylvania, Virginia, Indiana, Wisconsin, Arkansas, Texas, Nevada, Minnesota, and California. Wh. Cr. L. 8th ed. § 393. In Connecticut by statute special degree must be designated. *State v. Smith*, 38 Conn. 397. In Kansas the assault must be averred to be deliberate and premeditated. *State v. Brown*, 21 Kas. 38. As to Iowa, see *State v. McNally*, 32 Iowa, 81. As to Missouri, *State v. Phillips*, 24 Mo. 475.

(c) 3 Chit. C. L. 170; *Davis's Precedents*, 170. See *infra*, 156.

C. D. then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said A. B., in and upon the right side of the belly of him the said C. D., one mortal wound of the depth of four inches, and of the breadth of half an inch; of which said mortal wound, he the said C. D. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B., him, the said C. D., in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder. (*Conclude as in book 1, chap. 3.*)

(116) *Murder. By cutting the throat.*(d)

That A. B., of, etc., on at in the county aforesaid, with force and arms, in and upon one C. D. feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said A. B., with a certain knife, made of iron and steel, which he the said A. B. in his right hand then and there had and held, the throat of him the said C. D. feloniously, wilfully, and of his malice aforethought, did strike and cut; and that the said A. B., with the knife aforesaid, by the striking and cutting aforesaid, did then and there give to him the said C. D., in and upon the said throat of him the said C. D., one mortal wound, of the length of three inches, and of the depth of two inches; of which said mortal wound the said C. D., from the said day of to the day of aforesaid, at aforesaid, in the county aforesaid, did suffer and languish, and languishing did live; on which said day of aforesaid, in the year aforesaid, at aforesaid, in the county aforesaid, he the said C. D., of the said mortal wound, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. him the said C. D., in manner and form aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did kill and murder. (*Conclude as in chap. 3.*)

(d) 3 Ch. C. L. 757; Davis's Precedents, 173.

(117) *Murder. Against principal in the first and principal in the second(e) degree, for shooting with a pistol.(f)*

That T. P. K., late of the said county of Monroe, laborer, and D. C., late of said county of Monroe, laborer, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the fifth day of October, in the year of our Lord eighteen hundred and thirty-five, with force and arms, at the said county of Monroe, in and upon one P. S. . . . in the peace of God and of the said State of Alabama, then and there being, feloniously, wilfully, and of their malice aforethought, did make an assault; and that the said T. P. K., a certain pistol of the value of ten dollars, then and there loaded and charged with gunpowder and twenty leaden bullets, commonly called buckshot, which pistol he, the said T. P. K., in his right hand, then and there had and held, to, against, and upon the said P., then and there feloniously, wilfully, and of his malice aforethought, did shoot and discharge; and that the said T. P. K., with the leaden bullets aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder, shot and sent forth, as aforesaid, the aforesaid P., in and upon the buttocks of him the said P., a little above the rectum of him the said P., then and there, feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, giving to the said P. then and there, with the leaden bullets aforesaid, commonly called buckshot, as aforesaid, so as aforesaid shot, discharged, and sent forth out of the pistol aforesaid, by the said T. P. K., in and upon the said buttocks of him, the said P., a little above the rectum of him, the said P., one mortal wound of the depth of six inches, and of the breadth of half an inch, of which said mortal wound the said P., from the said fifth day of October, in the year of our Lord eighteen hundred and thirty-five, until the thirteenth of the same month of October, in the year last aforesaid, in the county aforesaid, did languish, and languishing did live; on which said thirteenth day of October,

(e) It should be observed that the party indicted as principal in the first degree can be convicted although it appear that he was only principal in the second degree; and so of the converse. *State v. Cockman*, 1 Wius. (N. C.) No. 2, 95. See *supra*, 97, and notes.

(f) This form was sustained in *State v. Coleman*, 5 Port. 32.

in the year last aforesaid, the same P., at the county aforesaid, of the mortal wound aforesaid, died ; and that the aforesaid D. C., then and there, feloniously, wilfully, and of his malice aforethought, was present, aiding, helping, abetting, and comforting, assisting and maintaining the said T. P. K., the felony and murder aforesaid, in manner and form aforesaid, to do and commit. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said T. P. K. and the said D. C., the said P. then and there, in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder. (*Conclude as in book 1, chap. 3.*)

(117a) *Murder. By pistol shot in Massachusetts.*

“The jurors for, etc., on their oath present, that J. H. C., etc., on, etc., at, etc., with force and arms in and upon one J. H., feloniously, wilfully, and of his malice aforethought, did make an assault ; and that the said J. H. C., a certain pistol then and there charged with gunpowder and one leaden bullet, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off to, against, and upon the said J. H. ; and that the said J. H. C., with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by the force of the gunpowder aforesaid, by the said J. H. C., discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound the said J. H. in and upon the left side of the head of the said J. H. ; giving to the said J. H. then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said J. H. C., in and upon the left side of the head of the said J. H., one mortal wound of the depth of six inches and of the breadth of half an inch ; of which said mortal wound the said J. H. then and there instantly died. And so the jurors aforesaid, on their oath aforesaid, do say that the said J. H. C., her, the said J. H., in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder ; against the peace,” etc.(g)

(g) *Commonwealth v. Costly*, 118 Mass. 1.

(117b) *Murder. By pistol shot (under New York statute), with counts varying instruments of death.*

In the Court of Sessions of the county of Albany. Of September term, in the year of our Lord one thousand eight hundred and seventy-three. City and county of Albany, ss: The jurors for the people of the State of New York, in and for the body of the city and county of Albany, being then and there sworn and charged upon their oath, present, that E. L., late of the first ward of the city of Albany, in the county of Albany aforesaid, on, etc., with force and arms, at the town of Water-vliet, in the county of Albany aforesaid, in and upon one J. D. W., then and there being, feloniously, wilfully, of malice aforethought, and from a deliberate and premeditated design to effect the death of said J. D. W., did make an assault: and that the said E. L., a certain pistol, then and there charged and loaded with gunpowder and one leaden bullet, which he, the said E. L., then and there in his right hand had and held at and against the said J. D. W., then and there feloniously, wilfully, of his malice aforethought, and from a deliberate and premeditated design to effect the death of said J. D. W., did shoot off and discharge; and that the said E. L., with the leaden bullet aforesaid, by means of shooting off and discharging the said pistol so loaded at and against the said J. D. W., did then and there feloniously, wilfully, of his malice aforethought, and from a deliberate and premeditated design to effect the death of the said J. D. W., strike, penetrate, and wound the said J. D. W. in and upon the front part of the head of the said J. D. W., giving to him, the said J. D. W., then and there, with the leaden bullet aforesaid, by means of shooting off and discharging the said pistol so loaded, at and against the said J. D. W., and by such striking, penetrating, and wounding the said J. D. W. as aforesaid, one mortal wound in and through the head of him the said J. D. W., of which said mortal wound the said J. D. W. did then and there soon after die. And the jurors aforesaid, upon their oath aforesaid, do say, that the said E. L., him, the said J. D. W., in the manner and by the means aforesaid, feloniously, wilfully, of his malice aforethought, and from a deliberate and premeditated design to effect the death of the said J. D. W., did kill

and murder, contrary to the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that E. L., late of the first ward of the city of Albany, in the county of Albany aforesaid, on, etc., with force and arms, at the town of Watervliet, in the county of Albany aforesaid, in and upon one J. D. W. then and there being, feloniously, wilfully, and from a deliberate and premeditated design to effect the death of said J. D. W., did make an assault; and that the said E. L. a certain pistol, then and there charged and loaded with gunpowder and one leaden bullet, which he the said E. L. then and there in his right hand had and held, at and against the said J. D. W., then and there feloniously, wilfully, and from a premeditated and deliberate design to effect the death of said J. D. W., did shoot off and discharge; and that the said E. L., with the leaden bullet aforesaid, by means of shooting off and discharging the said pistol so loaded at and against the said J. D. W., did then and there feloniously, wilfully, and from a deliberate and premeditated design to effect the death of the said J. D. W., strike, penetrate, and wound the said J. D. W. in and upon the front part of the head of the said J. D. W., giving to him, the said J. D. W., then and there, with the leaden bullet aforesaid, by means of shooting off and discharging the said pistol so loaded, at and against the said J. D. W., and by such striking, penetrating, and wounding the said J. D. W. as aforesaid, one mortal wound in and through the head of him, the said J. D. W., of which said mortal wound the said J. D. W. did then and there soon after die. And the jurors aforesaid, upon their oath aforesaid, do say that the said E. L., him the said J. D. W. in the manner and by the means aforesaid, feloniously, wilfully, and from a deliberate and premeditated design to effect the death of the said J. D. W., did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

[Here follow fourteen similar counts alleging other wounds by other shots.]

Seventeenth Count.—And the jurors aforesaid, upon their oath

aforesaid, do further present that the said E. L., on, etc., at the town of Watervliet, in the county of Albany aforesaid, with force and arms, in and upon J. D. W., feloniously, wilfully, of malice aforethought, and from a deliberate and premeditated design to effect the death of said J. D. W., did make an assault, and that the said E. L., with a certain razor, which he, the said E. L., in his right hand, then and there, had and held, the throat of him, the said J. D. W., feloniously, wilfully, of his malice aforethought, and from a deliberate and premeditated design to effect the death of the said J. D. W., did strike and cut, and that the said E. L., with the razor aforesaid, by the striking and cutting aforesaid, did then and there give to him, the said J. D. W., in and upon the throat of him, the said J. D. W., one mortal wound of the length of three inches and of the depth of two inches, of which said mortal wound the said J. D. W. did suffer and languish at the town of Watervliet in the said county of Albany, and that soon thereafter the said J. D. W., at the said town of Watervliet in the said county of Albany, on the said fifth day of August, in the year of our Lord one thousand eight hundred and seventy-three, of the said mortal wound, did die.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said E. L., in manner and form aforesaid, then and there feloniously, wilfully, of his malice aforethought, and from a deliberate and premeditated design to effect the death of the said J. D. W., did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

Eighteenth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. L., on, etc., at the town of Watervliet, in the county of Albany aforesaid, with force and arms in and upon said J. D. W., feloniously, wilfully, and from a premeditated design to effect the death of the said J. D. W., did make an assault, and that the said E. L., with a certain razor, which he, the said E. L., in his right hand then and there had and held, the throat of him, the said J. D. W., feloniously, wilfully, and from a deliberate and premeditated design to effect the death of the said J. D. W., did strike and cut, and that the said E. L., with the razor aforesaid, by the striking and cutting aforesaid, did then and there give to him

the said J. D. W., in and upon the throat of him, the said J. D. W., one mortal wound of the length of three inches, and of the depth of two inches, of which said mortal wound the said J. D. W. did suffer and languish at the town of Watervliet, in said county of Albany; and that soon thereafter the said J. D. W., at the said town of Watervliet, in the said county of Albany, on the said fifth day of August, in the year of our Lord one thousand eight hundred and seventy-three, of the said mortal wound did die.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said E. L., him, the said J. D. W., in manner and form aforesaid, then and there feloniously, wilfully, and from a deliberate and premeditated design to effect the death of said J. D. W., did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

[Here follow four other similar counts, two alleging the wounds by a knife and two by some sharp instrument to the jurors unknown.](h)

NATHANIEL C. MOAK, District Attorney.

(117c) *Murder by shot-gun under Indiana statute.*

The grand jurors for, etc., upon their oaths present, that L. V., on, etc., at, etc., did then and there unlawfully, feloniously, purposely, and with premeditated malice, kill and murder M. M., by then and there feloniously, purposely, and with premeditated malice, shooting and mortally wounding the body and person of said M. M., with a gun loaded with gunpowder and leaden balls, which he, the said L. V., then and there in his hands had and held; and so the jurors aforesaid, on their oaths aforesaid, do charge and present, that, on the day aforesaid, in the manner and form aforesaid, the said L. V. did feloniously, purposely, and with premeditated malice, kill and murder the said M. M., contrary, etc.(i)

(117d) *Murder by shooting in Iowa.*

The said G. S., on, etc., in, etc., in and upon the body of one

(h) Under this indictment the defendant, Lowenstein, was convicted and executed. See Pamphlet Report, 1874.

(i) Veatch v. State, 56 Ind. 584.

W. P., then and there being, wilfully, feloniously, deliberately, premeditatedly by lying in wait, and of his malice aforethought, did commit an assault with a deadly weapon, being a pistol then and there held in the hands of the said G. S., and loaded and charged with powder and bullet, and then and there the said G. S. did, by lying in wait with the specific intent to kill and murder the said W. P., wilfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, shoot off and discharge the contents of said deadly weapon, being the powder and bullet aforesaid, at, against, into, and through the head and body of the said W. P., thereby wilfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, inflicting upon the head and body of the said W. P., a mortal wound, of which said mortal wound the said W. P. then and there did die.(j)

(117e) *Information in Kansas for murder by shooting.*

And now comes E. F. S., county attorney for M. County and State of K., and here in said district court, in the name, by the authority, and on behalf of the State of K., information gives: That one E. A. McC., late of said county of M., on, etc., at, etc., in and upon one L. H., then and there being, did wilfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, make an assault; and that the said E. A. McC., a certain revolving pistol, then and there charged with gunpowder and divers, to wit, three leaden bullets, which said revolving pistol, he the said E. A. McC. in his right hand then and there had and held, then and there wilfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, did discharge and shoot off, to, against, upon, and through the said L. H.; and that the said E. A. McC., with the divers, to wit, three leaden bullets aforesaid, out of the revolving pistol aforesaid, then and there by force of the gunpowder aforesaid, by the said E. A. McC. discharged and shot off as aforesaid, then and there wilfully, feloniously, deliberately, premeditatedly, and of his

(j) It was held by the Supreme Court: 1st. That this indictment was sufficient as charging murder in the first degree; 2d. That the time of the death was sufficiently alleged, as being at the time and place when and where the assault was made; 3d. That the indictment was sufficient as charging that deceased was a human being. *State v. Stanley*, 33 Iowa, 526.

malice aforethought, did strike, penetrate, and wound the said L. H., in, upon, and through the left side of the face of him the said L. H., and in, upon, and through the right side of the lower part of the breast of him the said L. H., and in, upon, and through the right side of the body of him the said L. H., thereby then and there giving to him the said L. H., in, upon, and through the left side of the face of him the said L. H., penetrating through the face and head of him the said L. H., and in, upon, and through the right side of the lower part of the breast of him the said L. H., penetrating through the body of him the said L. H., and in, upon, and through the right side of the body of him the said L. H., penetrating through the body of him the said L. H., three mortal wounds, of which said three mortal wounds be the said L. H., then and there instantly died. Wherefore the said county attorney doth inform the Court here, that the said E. A. McC. him, the said L. H., in the manner and by the means aforesaid, wilfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, did kill and murder, contrary, etc.(k)

(117f) *Murder by shooting under Nevada statute.*

The defendant R. H. C., above named, is accused by the grand jury of, etc., of the crime of murder committed as follows, to wit: That the said R. H. C., on, etc., or thereabouts, at, etc., in and upon one C. T. *alias* "M. C.," unlawfully, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said R. H. C., a certain pistol, then and there charged with gunpowder and divers leaden bullets, which said pistol he, the said R. H. C., in his hands then and there had and held, at and against the said C. T. *alias* "M. C.," then and there unlawfully, feloniously, wilfully, and of his malice aforethought, did shoot off and discharge; and that the said R. H. C., with the leaden bullets aforesaid, by means of shooting off and discharging the said pistol so loaded, to, at, and against the said C. T. *alias* "M. C.," as aforesaid, did then and there unlawfully, feloniously, wilfully, and of his malice aforethought, strike, penetrate, and wound the said C. T. *alias* "M. C.," giving him

the said C. T. *alias* "M. C.," then and there with the leaden bullets aforesaid, by means of shooting off and discharging the said pistol, to, at, and against the said C. T. *alias* "M. C.," and by such striking, penetrating, and wounding the said C. T. *alias* "M. C." as aforesaid, one mortal wound in and upon the arms, side, ribs, lungs, and heart of him, the said C. T. *alias* "M. C.," of which said mortal wound the said C. T. *alias* "M. C." did then and there die. All of which is contrary to the form, etc.(l)

(118) *Against principal in the first and principal in the second degree. Hanging.(m)*

That J. J., late of, etc., yeoman, and P. M., late of, etc., yeoman, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on, etc., with force and arms, in the county aforesaid, in and upon one S. C., in the peace of God and the commonwealth then and there being, feloniously, wilfully, and of their malice aforethought, did make an assault; and that he, the said J. J., a certain rope of the value of five cents, on and about the neck of her the said S. C., then and there feloniously, wilfully, and of his malice aforethought, did fix, tie, and fasten, and that the said J. J. with the rope aforesaid, so as aforesaid fastened on and about the neck of her the said S. C., her the said S. C. then and there feloniously, wilfully, and of his malice aforethought, did choke, suffocate, and strangle, of which said choking, suffocating, and strangling, she the said S. C. then and there instantly died; and that the said P. M., at the time of committing the felony and murder aforesaid by the said J. J. in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, was present, aiding, helping, and abetting, assisting, comforting, and maintaining the said J. J., the felony and murder aforesaid in manner and form aforesaid, to do, commit, and perpetrate. And so the inquest aforesaid, upon their oaths and affirmations aforesaid, do say, that the said J. J. and P. M., her the said S. C., then and there in manner and form

(l) It was said in *State v. Crozier*, 12 Nev. 300, that this indictment was sufficient to sustain a verdict for murder in the first degree, without the use of the words deliberately and premeditatedly.

(m) Drawn in 1807 by Mr. J. B. M'Kean, and sustained by the Supreme Court of Pennsylvania.

aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(119) *Second count. Against same. Beating and hanging.*

And the inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said J. J. and P. M., not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on, etc., with force and arms in the county aforesaid, in and upon the said S. C., in the peace of God and the commonwealth then and there being, feloniously, wilfully, and of their malice aforethought, did make an assault, and that he the said J. J. with a certain large stick of no value, which he the said J. J. in his right hand then and there had and held, her the said S. C. then and there feloniously, wilfully, and of his malice aforethought, divers times did strike and beat, giving to her the said S. C. then and there, by striking and beating of her the said S. C. as aforesaid, with the stick aforesaid, in and upon the back part of the head of her the said S. C., one mortal bruise; and that the said J. J. also a certain rope of the value of five cents, on and about the neck of her the said S. C., then and there feloniously and wilfully, and of his malice aforethought, did fix, tie, and fasten, and that the said J. J. with the rope last aforesaid, so as last aforesaid fixed, tied, and fastened on and about the neck of her the said S. C., then and there did violently squeeze, press, and bind her the said S. C.; of which said striking and beating of her the said S. C., in and upon the back part of the head of her the said S. C. with the stick aforesaid, and also of the squeezing, pressing, and binding of the neck of her the said S. C. with the rope as last aforesaid, she the said S. C. then and there instantly died; and that the said P. M., at the time of committing the felony and murder last aforesaid, by the said J. J. in manner and form last aforesaid, feloniously, wilfully, and of his malice aforethought, was present aiding, helping, abetting, and assisting, comforting, and maintaining the said J. J., the felony and murder last aforesaid in manner and form last aforesaid to do, commit, and perpetrate.

And so the inquest aforesaid, upon their oaths and affirmations aforesaid, do further say, that the said J. J. and P. M., her the said S. C. then and there in manner and form last aforesaid,

feloniously and wilfully and of their malice aforethought did kill and murder, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(120) *Murder. Striking with a poker.*(*n*)

That C. D., of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F., feloniously, wilfully, and of his malice aforethought, did make an assault; and that he the said C. D. then and there with a certain iron poker, which he the said C. D. in both his hands then and there had and held, the said E. F., in and upon the back part of the head of him the said E. F., then and there feloniously, wilfully, and of his malice aforethought, did strike, giving unto him the said E. F. then and there, with the said iron poker, by the stroke aforesaid, in manner aforesaid, in and upon the back part of the head of him the said E. F., one mortal wound, of the length of three inches, and of the depth of one inch; of which said mortal wound, he the said E. F., on the said day of at B. aforesaid, in the county aforesaid, did languish, and languishing did live; on which same day of aforesaid, at B. aforesaid, in the county aforesaid, he the said E. F., of the said mortal wound, died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said C. D. him the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(121) *Murder. By riding over with a horse.*(*o*)

That C. D., of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F., feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said C. D., then and there riding upon a horse, the said horse in and upon the said E. F. then and there feloniously, wilfully, and of his malice aforethought, did ride and force, and him the said E. F., with the horse aforesaid, then and there, by such riding and forcing as aforesaid, did throw to the ground; by means whereof the said horse, with his hinder feet, him the said E. F., so thrown

(*n*) 3 Chit. C. L. 761; Davis's Precedents, 175.

(*o*) 3 Chit. C. L. 765; 2 Stark. C. P. 380; Davis's Precedents, 177.

to and upon the ground as aforesaid, in and upon the back part of the head of him the said E. F., did then and there strike and kick, thereby then and there giving to him the said E. F. in and upon the back part of the head of him the said E. F., one mortal fracture and contusion, of the breadth of two inches, and of the depth of one inch ; of which said mortal fracture and contusion, the said E. F. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. him the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(122) *Murder. By drowning.*

That C. D., of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F., feloniously, wilfully, and of his malice aforethought, did make an assault ; and that the said C. D. then and there feloniously, wilfully, and of his malice aforethought, did take the said E. F. into both the hands of him the said C. D., and did then and there feloniously, wilfully, and of his malice aforethought, cast, throw, and push the said E. F. into a certain pond there situate, wherein there was a great quantity of water ; by means of which said casting, throwing, and pushing of the said E. F. into the pond aforesaid, by the said C. D. in form aforesaid, he the said E. F., in the pond aforesaid, with the water aforesaid, was then and there choked, suffocated, and drowned ; of which said choking, suffocation, and drowning, he the said E. F. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D., in manner and form aforesaid, him the said E. F. feloniously, wilfully, and of his malice aforethought, did kill and murder. (p) (*Conclude as in book 1, chapter 3.*)

(123) *Murder. By strangling.(q)*

That E. W. K., late, etc., not having the fear, etc., but being moved, etc., on, etc., in and upon one J. D., in the peace, etc.,

(p) 3 Chit. C. L. 768 ; Davis's Precedents, 181.

(q) This indictment, with a little qualification in the first count, is the same with that sanctioned by the Supreme Court of North Carolina in *State v. Hane*, 2 Dev. 432. "It is lastly urged," said the court, "that upon a critical

feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said E. W. K. a certain rope about the neck of the said J. D. then and there feloniously and wilfully, and of his malice aforethought, did fix, tie, and fasten, and that the said E. W. K. with the rope aforesaid, (*him*) the said J. D. then and there feloniously and wilfully, and of his malice aforethought, did drag, pull, choke, strangle, and dislocate the neck; of which said dragging, pulling, choking, strangling, and dislocation of the neck, he the said J. D. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said E. W. K., in, etc., the said J. D. in manner and form aforesaid, feloniously and wilfully, and of his malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(124) *Second count. By strangling and stabbing with unknown persons.*

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. W. K. with divers other persons, etc., afterwards, to wit, etc., not having the fear, etc., in and upon the said J. D. in the peace, etc., feloniously, wilfully, and of their malice aforethought, did make an assault, and that the said E. W. K. a certain rope about the neck of the said J. D. then and there feloniously, wilfully, and of his malice aforethought, did fix, tie, and fasten; and that the said E. W. K. by means of said rope, him the said J. D. then and there feloniously, wilfully, and of his malice aforethought, did drag, pull, choke, and strangle;

construction of the indictment, it does not more appear, that Kimbrough dragged, pulled, and choked Davis, than that Davis dragged, pulled, and choked Kimbrough. However this may be upon the first count, I think no such objection as this appears on the second. In that count it is charged that Kimbrough made an assault upon Davis, and that Kimbrough placed a rope around Davis's neck, and that the same Kimbrough, by means of said rope, the said John Davis did choke and strangle; and the said Kimbrough, with a dagger, which he then in his hand held, the said John Davis, in and upon the belly of the said John Davis, did thrust and penetrate, giving to him the said John Davis, with the said dagger, in and upon the belly of him the said John Davis, a mortal wound, of which the said John Davis died on the next day; with a conclusion, that he the said Kimbrough, the said John Davis did kill and murder. Human ingenuity cannot make out of this, that it stands indifferent, whether Kimbrough or Davis was the actor in all and every act necessary to constitute murder, or which was the agent and which the sufferer, not only in the close of the drama, but in each and every act which led to the catastrophe."

The difficulty raised as to the first count is obviated by the insertion of "*him*" in the seventh line. See *infra*, 128, 160, for similar forms.

and that the said E. W. K. with a certain drawn dagger, being part of a walking cane, etc., which he the said E. W. K. in his right hand then and there had and held, him the said J. D. in and upon the forepart of the belly and divers other parts of the body of the said J. D. then and there, feloniously, wilfully, and of his malice aforethought, did strike, thrust, and penetrate, giving to the said J. D. then and there, with the dagger aforesaid, in and upon the aforesaid forepart of the belly and divers other parts of the body of the said J. D., several mortal wounds of the breadth of one inch, and of the depth of six inches: as well of which pulling, dragging, choking, and strangling, as also of the striking, thrusting, and penetrating, etc., he the said J. D. from, etc., until, etc., did languish, etc., on which, etc., the said J. D. in, etc., of the pulling, dragging, choking, and strangling, as well as of the mortal wounds inflicted as aforesaid, died; and that divers other persons, etc. And so the jurors, etc., do further say, that the said E. W. K. and divers other persons, the said J. D. then and there in manner and form last aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(125) *Murder. By burning a house where the deceased was at the time.*(s)

That S. C., late, etc., not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fifth day of April, one thousand eight hundred and thirty, with force and arms, etc., at the township aforesaid, in the county aforesaid, and within the jurisdiction of this court, did wilfully and maliciously burn a certain dwelling-house of one R. S., there situate, and that one J. H., of the township and county aforesaid, within the jurisdiction aforesaid, in the said dwelling-house then and there being, before, at, and during the said burning, and was then and there, by reason and means of the said burning so committed and done by the said S. C., in manner aforesaid, mortally burned and killed; and so the jurors aforesaid, upon their oaths aforesaid, do say, that the said S. C., him the said J. H., in manner and form aforesaid, feloniously

(s) *State v. Cooper*, 1 Green, 362. See *infra*, 1154, for the subsequent action of the court on this indictment.

and wilfully, and of his malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(126) *Second count. Averring a preconceived intention to kill.*

And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said S. C., not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and of his malice aforethought contriving and intending one J. H., there being in a certain dwelling-house of one R. S., situate in the township and county aforesaid, feloniously, wilfully, and of his malice aforethought, to burn, kill, and murder, on the same day and year aforesaid, with force and arms, at the township aforesaid, in the county and within the jurisdiction aforesaid, did wilfully and maliciously set fire to and burn the said dwelling-house, the said J. H. then and there, before, at, and during the said burning, being in the said dwelling-house, he the said S. C., then and there well knowing the said J. H. to be in the said dwelling-house, and that he the said S. C., in so setting fire to and burning the said dwelling-house as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did mortally burn the body of the said J. H.; by means of which said mortally burning of the body of the said J. H., as aforesaid, he, the said J. H., on the day and year aforesaid, at the township aforesaid, in the county and within the jurisdiction aforesaid, did die; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said S. C., the said J. H., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against, etc. (*Conclude as in book 1, chapter 3.*)

(127) *Murder. First count, by choking. Against two—one as principal in the first degree, and the other in the second degree.*

That J. W., late of the county aforesaid, yeoman, and H. N., late of the county aforesaid, widow, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the tenth day of April, in the year one thousand eight hundred and twenty-five, at the county aforesaid, and within the jurisdiction of this court, with force and arms, in and upon one G. H. W., in the peace of God and of the com-

monwealth then and there being, feloniously, wilfully, and of their malice aforethought, did make an assault, and that he the said J. W., a certain muslin handkerchief of the value of twelve cents, about the neck of him the said G. H. W., then and there feloniously, wilfully, and of his malice aforethought, did fix, tie, and fasten, and that the said J. W., with the muslin handkerchief aforesaid, him the said G. H. W., then and there feloniously, wilfully, and of his malice aforethought, did choke, suffocate, and strangle; of which said choking, suffocating, and strangling, he the said G. H. W. then and there instantly died. And that she the said H. N., at the time of the committing of the felony and murder aforesaid, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, was present aiding, abetting, and counselling the said J. W., the felony and murder aforesaid to do and commit; and so the inquest aforesaid, upon their oaths and affirmation aforesaid, do say, that the said J. W. and the said H. N., the said G. H. W., in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(128) *Second count, by choking and beating. Against two—one as principal in first degree, the other in second degree.*

And the inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said J. W., and the said H. N., not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the said tenth day of April, in the year one thousand eight hundred and twenty-five, at the county aforesaid, and within the jurisdiction of this court, with force and arms, in and upon the said G. H. W., in the peace of God and of the commonwealth then and there being, feloniously, wilfully, and of their malice aforethought, did make an assault; and that he, the said J. W., a certain muslin handkerchief of the value of twelve cents, about the neck of him the said G. H. W., then and there feloniously, wilfully, and of his malice aforethought, did fix, tie, and fasten, and that the said J. W. with the muslin handkerchief aforesaid, the neck of him the said G. H. W., then and there feloniously, wilfully, and of his malice aforethought, did violently squeeze

and press; and that the said J. W., with a certain large stick of the value of one cent, which he the said J. W., then and there in his right hand had and held, him the said G. H. W., in and upon the right side of the head of him the said G. H. W., then and there feloniously, wilfully, and of his malice aforethought, did strike and beat, then and there giving to the said G. H. W., by then and there so striking and beating him the said G. H. W. with the stick aforesaid in and upon the right side of the head of the said G. H. W., one mortal bruise of the length of two inches, and of the breadth of one inch; of which said violent squeezing and pressing of the neck of him the said G. H. W., as well as of the said striking and beating of him the said G. H. W., in and upon the right side of the head of him the said G. H. W., with the stick aforesaid, he the said G. H. W. then and there instantly died; and that she the said H. N., at the time of the committing of the felony and murder last aforesaid, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, was present aiding, abetting, and counselling the said J. W. the felony and murder last aforesaid to do and commit; and so the inquest aforesaid, upon their oaths and affirmations aforesaid, do say, that the said J. W. and the said H. N., the said G. H. W., in manner and form last aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(129) *Murder. By poisoning with arsenic.(t)*

That R. S., late, etc., laborer, and A. S., etc., not having the fear of God before their eyes, but being moved and seduced by the instigations of the devil, wickedly contriving and intending one E. S. with poison, wilfully, feloniously, and of their malice aforethought to kill and murder, on, etc., with force and arms, at the parish aforesaid, in the county aforesaid, feloniously, wilfully, and of their malice aforethought, a large quantity of a

(t) *R. v. Sandys*, 1 C. & M. 345. A verdict of guilty was supported on this form, it being held that the allegation "and of the said mortal sickness died," was good without stating that the deceased died of the poisoning. When one kind of poisoning is averred and another proved, the variance is not fatal. 2 *Hale* P. C. 485; *R. v. Tye*, R. & R. 345; *R. v. Culkin*, 5 C. & P. 121; *R. v. Waters*, 7 C. & P. 250; *R. v. Groundsell*, *Ibid.* 788; *R. v. Martin*, 5 C. & P. 128. See *R. v. Clark*, 2 B. & B. 473; *Carter v. State*, 2 *Carter*, Ind. 617; *State v. Vawter*, 7 *Blackf.* 592.

certain deadly poison called white arsenic, did give and administer unto the said E. S. with intent that she should take and swallow down the same into her body (they then and there well knowing the said white arsenic to be a deadly poison), and the said white arsenic so given and administered unto her by the said R. S. and A. S., the said E. S. did then and there take and swallow down into her body ; by reason and by means of which said taking and swallowing down the said white arsenic into her body as aforesaid, the said E. S. became and was mortally sick and distempered in her body, of which said mortal sickness and distemper the said E. S. from, etc., until, etc., at the parish aforesaid, in the county aforesaid, did languish and languishing did live, on which said, etc., at, etc., the said E. S. of the said mortal sickness died ; and so the jurors aforesaid, upon their oath aforesaid, do say that the said R. S. and A. S., the said E. S. in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought did kill and murder, etc.

(129a) *Another form.*

That A. C. L., late of said county, yeoman, not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil, and of his malice aforethought, wickedly contriving and intending a certain M. L. with poison, wilfully, feloniously, and of his malice aforethought, to kill and murder, on the thirty-first day of May, in the year of our Lord one thousand eight hundred and seventy-six, with force and arms, at the county aforesaid, and within the jurisdiction of this court, did knowingly, wilfully and feloniously, and of his malice aforethought, put, mix, and mingle certain deadly poison—to wit, white arsenic—in certain coffee which at the time aforesaid had been prepared for the use of the said M. L., he, the said A. C. L., then and there, well knowing that the said coffee with which he, the said A. C. L., did so mix and mingle the deadly poison aforesaid, was then and there prepared for the use of the said M. L. with the intent to be then and there administered to him for his drinking the same, and the said coffee with which the said poison was so mixed, as aforesaid, afterwards, to wit, on the said 31st day of May, in the year last aforesaid, was delivered to the said M. L. to be then and there drank by him,

and the said M. L. not knowing the said poison to have been mixed with the said coffee, did afterwards, to wit, on the 31st day of May, in the year last aforesaid, at the county aforesaid, there drink and swallow down into his body a large quantity of said poison, so mixed as aforesaid with the said coffee, and the said M. L. of the poison aforesaid, and by the operation thereof, on the said 31st day of May, in the year last aforesaid, in the county aforesaid, became sick and greatly distempered in his body, of which said sickness and distemper of body, occasioned by the taking, drinking and swallowing down in the body of the said M. L. of the poison aforesaid, so mixed and mingled in the said coffee as aforesaid, he, the said M. L., from the said 31st day of May, in the year last aforesaid, on which he had so drunk and swallowed down the same as aforesaid, until the 1st day of June, in the year last aforesaid, in the county aforesaid, did languish, and languishing did live, on which said 1st day of June, in the year last aforesaid, at the county aforesaid, he, the said M. L., of the poison aforesaid, so taken, drank, and swallowed down as aforesaid, and of the said sickness and distemper thereby occasioned, did die. And so the inquest aforesaid, upon their oaths and affirmations respectively, as aforesaid, do say, that the said A. C. L., him, the said M. L., in the manner and by the means aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the act of the general assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

(Signed)

JOHN C. MERRILL,
District Attorney.(u)

(130) *Murder by poisoning. First count, with arsenic in chicken soup.*(v)

That L. C., late of the county aforesaid, widow, otherwise called L. E. M., late of the county aforesaid, widow, and L. A. M., late of the county aforesaid, yeoman, otherwise called C. A.,

(u) This was the indictment in *Com. v. Laros*, 84 Penn. St. 200. See Wh. Cr. L. 8th ed. §§ 59, 61, 65, 121, 392.

(v) *Com. v. Mina*, Court of O. & T. of Bucks County, 1831 (pamph.). The defendant Mina was convicted and executed.

not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, and of their malice aforethought contriving and intending a certain W. C. to deprive of his life, and him the said W. C., feloniously to kill and murder, on, etc. (*date*), with force and arms at the county aforesaid, and within the jurisdiction of this court, did knowingly, wilfully, feloniously, and of their malice aforethought, mix and mingle certain deadly poison, called arsenic, in certain chicken soup, which had been, at divers days and times, during the time aforesaid, prepared for the use of the said W. C., to be drunk by him the said W. C. (they the said L. C. and the said L. M., then and there well knowing that the said chicken soup with which they, the said L. C. and the said L. M., did so mix and mingle the said deadly poison as aforesaid, was then and there prepared for the use of the said W. C., with intent to be then and there administered to him for his drinking the same), (*w*) and the said chicken soup with which the said deadly poison was so mixed as aforesaid, afterwards, to wit, on, etc., at the county and within the jurisdiction aforesaid, was delivered to the said W. C., to be then and there drunk by him the said W. C., and he the said W. C. (not knowing the said poison to have been mixed with the said chicken soup) did afterwards, to wit, on, etc., there drink and swallow down into his body several quantities of the said deadly poison so mixed as aforesaid with the said chicken soup, and the said W. C. of the poison aforesaid and by the operation thereof then and there became sick and greatly distempered in his body, of which said sickness and distemper of body, occasioned by the said drinking, taking, and swallowing down into the body of the said W. C. of the deadly poison aforesaid, so mixed and mingled in the said chicken soup as aforesaid, he the said W. C. from the said several days and times on which he has so taken, drunk, and swallowed down the same as aforesaid, until the said twenty-third day of June, in the year last aforesaid, at the county aforesaid, and within the jurisdiction aforesaid, did languish, and lan-

(*w*) The allegation of *scienter* would be better given as follows: "he the said (defendant) well knowing the said arsenic to be a deadly poison." See form 133. That a *scienter* may be inferred from other allegations, see *Com. v. Hersey*, 2 Allen, 173; *Com. v. Earle*, 1 Whart. R. 525. That a *scienter* in some shape is in such cases essential, see *State v. Yarborough*, 77 N. C. 524; *Fairlee v. People*, 11 Ill. 1.

guishing did live, on which said twenty-third day of June, in the year last aforesaid, at the county and within the jurisdiction aforesaid, he, the said W. C., of the poison aforesaid, so taken, drunk, and swallowed down as aforesaid, and of the said sickness and distemper occasioned thereby, did die.(x) And so the inquest aforesaid, upon their oaths and solemn affirmations aforesaid, do say, that the said L. C., and the said L. M., him, the said W. C., then and there in the manner and by the means aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(131) *Second count. Against one defendant as principal in the first and the other as principal in the second degree.*

And the inquest aforesaid, inquiring as aforesaid, upon their oaths and solemn affirmations aforesaid, do further present, that the said L. C., otherwise called L. M., not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, and of her malice aforethought, wickedly contriving and intending the said W. C. to deprive of his life, and the said W. C. feloniously to kill and murder, on, etc. (*date*), with force and arms at the county aforesaid, and within the jurisdiction of this court, did feloniously, wilfully, and of her malice aforethought, mix and mingle certain deadly poison, called arsenic, in certain chicken soup, which had been at divers days and times, during the time aforesaid, prepared for the use of the said W. C., to be drunk by him, the said W. C. (she, the said L. C., then and there well knowing that the said chicken soup with which she, the said L. C., did so mix and mingle the said deadly poison as aforesaid, was then and there prepared for the use of the said W. C., with intent to be then and there administered to him for his drinking the same), and the said chicken soup with which the said deadly poison was so mixed as aforesaid, afterwards, to wit, on, etc., one thousand eight hundred and thirty-one, and on the said other days and times last mentioned, at the county and within the jurisdiction aforesaid, was delivered to the said W. C., to be then and there drunk by him, the said W. C., and he the said W. C. (not knowing the said

(x) As to causal relation in cases of poisoning, see Wh. Cr. L. 8th ed. § 536, and notes.

poison to have been mixed with the said chicken soup) did afterwards, to wit, on, etc., there drink and swallow down into his body several quantities of the said deadly poison so mixed as aforesaid with the said chicken soup, and the said W. C., of the poison aforesaid, and by the operation thereof, then and there became sick and greatly distempered in his body, of which said sickness and distemper of body, occasioned by the said drinking, taking, and swallowing down into the body of the said W. C. of the deadly poison aforesaid, so mixed and mingled in the said chicken soup as aforesaid, he, the said W. C., from the said several days and times, on which he had so taken, drunk, and swallowed down the said deadly poison as aforesaid, until the said twenty-third day of June, in the year last aforesaid, at the county aforesaid, and within the jurisdiction aforesaid, did languish, and languishing did live; on which said twenty-third day of June, in the year last aforesaid, at the county aforesaid, and within the jurisdiction aforesaid, he the said W. C., of the poison aforesaid so taken, drunk, and swallowed down as aforesaid, and of the said sickness and distemper occasioned thereby, did die. And that the said L. M., then and there feloniously, wilfully, and of his malice aforethought, was present, aiding and abetting the said L. C., the felony and murder aforesaid, in manner and form last aforesaid, to do and commit. And so the inquest aforesaid, upon their oaths and solemn affirmations aforesaid, do say, that the said L. C. and the said L. M., him the said W. C. then and there, in the manner and form last aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(132) *Third count. Against one as principal and the other as accessory before the fact.*

(Omitted in this edition.)

(133) *By placing poison so as to be mistaken for medicine.*(y)

That C. D., of said B., laborer, feloniously, and of his malice aforethought, devising and intending one E. F. to poison, kill, and murder, on the day of now last past, with force and

(y) Cro. C. A. 297-9; 2 Stark. C. P. 369; Chit. C. L. 774; Davis's Prec. 183.

arms, at B. aforesaid, in the county aforesaid, a certain quantity of arsenic, to wit, two drachms of arsenic, being a deadly poison, feloniously, wilfully, and of his malice aforethought, did put, infuse, mix, and mingle in and together with water, he the said C. D. then and there well knowing the said arsenic to be a deadly poison; and that the said C. D. the said arsenic, so as aforesaid put, infused in, and mixed and mingled in and together with water, into a certain glass phial, did put and pour; and the said glass phial, with the said arsenic put, infused in, and mixed and mingled in and together with the water as aforesaid contained therein, then and there, to wit, on the day of in the year aforesaid, with force and arms, at B. aforesaid, feloniously, wilfully, and of his malice aforethought, in the lodging room of the said E. F. did put and place, in the place and stead of a certain salutary medicine then lately before prescribed and made up for the said E. F., and to be taken by him the said E. F., he the said C. D. then and there feloniously, wilfully, and of his malice aforethought, intending that the said E. F. should drink and swallow down into his body the said arsenic, put, infused, mixed, and mingled in and together with water as aforesaid, contained in the said glass phial, by mistaking the same as and for the said salutary medicine, so prescribed and made up for the said E. F., and to be by him the said E. F. taken as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. F., not knowing the said arsenic, put, infused in, and mixed together with water as aforesaid, contained in the said glass phial, so put and placed by the said C. D., in the lodging room of the said E. F., in the place and stead of the said salutary medicine, then lately before prescribed and made up for the said E. F., to be taken by him the said E. F., in manner aforesaid, to be a deadly poison, but believing the same to be the true and real medicine, then lately before prescribed and made up for, and to be taken by him the said E. F., afterwards, to wit, on the same day of in the year aforesaid, at B. aforesaid, the said arsenic, so as aforesaid put, infused in, and mixed together with water, by the said C. D. as aforesaid, contained in the said glass phial, so put and placed by the said C. D., in the lodging room of him the said E. F., in the place and stead of the said medicine, then

lately before prescribed and made up for the said E. F., he the said E. F. did take, drink, and swallow down into his body; by means of which said taking, drinking, and swallowing down into the body of him the said E. F. of the said arsenic, so as aforesaid put, infused in, and mixed together with water by the said C. D. as aforesaid, he the said E. F. then and there became sick and distempered in his body; of which sickness and distemper of body, occasioned by the said taking, drinking, and swallowing down into the body of him the said E. F., of the said arsenic, so as aforesaid put, infused in, and mixed together with water by the said C. D. as aforesaid, he the said E. F., on the said day of in the year aforesaid, at B. aforesaid, in the county aforesaid, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. him the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did poison, kill, and murder. (*Conclude as in book 1, chapter 3.*)

(134) *Murder of a child by poison.*(z)

That C. M., etc., contriving and intending to kill and murder one G. M., etc., on the thirty-first day of March, in the third year of the reign of her present majesty, upon the said G. M., feloniously, etc., did make an assault, and that the said C. M., a large quantity, to wit, half an ounce weight of a certain deadly poison called laudanum, feloniously, etc., did give and administer unto the said G. M. with intent that he should take and swallow the same down into his body (she the said C. M. then and there well knowing the said laudanum to be a deadly poison), and the said G. M. the said laudanum, so given and administered unto him by the said C. M. as aforesaid, did take and swallow down into his body; by reason and by means of which said taking and swallowing down the said laudanum into his body, as aforesaid, the said G. M. became and was mortally sick and distempered in his body, of which said mortal

(z) *R. v. Michael*, 9 C. & P. 356; 2 Mood. C. C. 120. The prisoner purchased a bottle of laudanum, and directed the person who had charge of the child to give it a teaspoonful every night. The person did not do so, but another child got hold of the poison, and gave it to the deceased, who died of it. A conviction was sustained by the judges. *Wh. Cr. L.* 8th ed. §§ 135, 166, 207, 246, 345, 522.

sickness and distemper the said G. M., from, etc., till, etc., did languish, and etc., died. (*Conclude as in book 1, chapter 3.*)

(135) *By mixing white arsenic with wine and sending it to deceased, etc.(a)*

That A. B., late of, etc., of his malice aforethought, contriving and intending one C. D., with poison, feloniously to kill and murder, on with force and arms, at a large quantity of white arsenic, being a deadly poison, with a certain quantity of wine, feloniously, wilfully, and of his malice aforethought, did mix and mingle; he the said A. B. then and there well knowing the said white arsenic to be a deadly poison; and that the said A. B. afterwards, to wit, on the day of at aforesaid, the poison aforesaid, so as aforesaid mixed and mingled with the wine aforesaid, feloniously, wilfully, and of his malice aforethought, did send to her the said C. D. to take, drink, and swallow down; and that the said C. D., not knowing the poison aforesaid in the wine aforesaid to have been mixed and mingled as aforesaid, afterwards, to wit, on at aforesaid, the said poison, so as aforesaid mixed and mingled, by the persuasion and procurement of the said A. B., did take, drink, and swallow down; and thereupon the said C. D., by the poison aforesaid, so mixed and mingled as aforesaid by the said A. B., and so taken, drank, and swallowed down as aforesaid, became then and there sick and distempered in her body, and the said C. D. of the poison aforesaid, and of the sickness and distemper occasioned thereby, from the said day of until the day of at aforesaid, in the county aforesaid, did languish, and languishing did live; on which said day of she the said C. D., at aforesaid, in the county aforesaid, of the poison aforesaid, and of the sickness and distemper thereby occasioned as aforesaid, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. her the said C. D., in manner and form and by the means aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(a) 3 Chit. C. L. 776; Davis's Precedents, 185.

(136) *Murder by poisoning. First count, mixing white arsenic in chocolate.(b)*

That J. E., late of Lycoming County aforesaid, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil, and of his malice aforethought, wickedly contriving and intending a certain C. E. with poison, wilfully, feloniously, and of his malice aforethought, to kill and murder, on, etc., with force and arms, at Lycoming County aforesaid, did knowingly, wilfully, and feloniously and of his malice aforethought, put, mix, and mingle certain deadly poison, to wit, white arsenic, in certain chocolate which had been at divers days and times during the time aforesaid, prepared for the use of the said C. E., to be drunk by her the said C. E.; he the said J. E. then and there well knowing that the said chocolate, with which he the said J. E. did so mix and mingle the deadly poison as aforesaid, was then and there prepared for the use of the said C. E., with intent to be then and there administered to her for her drinking the same; and the said chocolate with which the said poison was so mixed as aforesaid, afterwards, to wit, on the said fourteenth day of October, in the year last aforesaid, and on the said other days and times, at L. aforesaid, was delivered (by the said J. E.) to the said C. E., to be then and there drunk by her; and the said C. E., not knowing the said poison to have been mixed with the said chocolate, did afterwards, to wit, on, etc., there drink and swallow down into her body, several quantities of the said poison so mixed as aforesaid with the said chocolate; and the said C. E., of the poison aforesaid, and by the operation thereof, on, etc., at Lycoming County aforesaid, became sick and greatly distempered in her body; of which said sickness and distemper of body, occasioned by the drinking, taking, and swallowing down into the body of the said C. E. of the poison aforesaid, so mixed and mingled in the said chocolate as aforesaid, she the said C. E., from the said several days and times on which she had so

(b) *Com. v. Earle*, 1 Whart. 525. Under this indictment the prisoner was executed. The omission of a direct averment of the *scienter* was held by the supreme court not to be ground for a *special allocatur*. At the same time it is more prudent that such averment should be specifiedly made. See notes to forms 97, 130.

drunk and swallowed down the same as aforesaid, until the sixteenth day of October, in the year last aforesaid, at Lycoming County aforesaid, did languish, and languishing did live; on which said sixteenth day of October, in the year last aforesaid, at Lycoming County aforesaid, she the said C. E., of the poison aforesaid, so taken, drunk, and swallowed down as aforesaid, and of the said sickness and distemper thereby occasioned, did die.

And so the inquest aforesaid, upon their oaths and affirmations respectively as aforesaid, do say, that the said J. E., her the said C. E., in the manner and by the means aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(137) *Second count. Mixing arsenic in tea.*

And that the said J. E., on, etc., at, etc., with force and arms, did knowingly, wilfully, feloniously, and of his malice aforethought, place, mix, and mingle certain deadly poison, to wit, white arsenic, in certain tea which had been at divers days and times during the time aforesaid prepared for the use of the said C. E., to be drunk by her the said C. E.; he the said J. E. then and there well knowing that the said tea, with which the said poison was mixed as aforesaid, was then and there prepared for the use of the said C. E., with intent to be then and there administered to her for her drinking the same. And the said tea with which the said poison was so mixed as aforesaid, afterwards, to wit, on, etc., at, etc., was delivered to the said C. E., to be then and there drunk by her; and the said C. E., not knowing the said poison to have been mixed with the said tea, afterwards, to wit, on the said fourteenth day of October, in the year last aforesaid, and on the said divers other days and times, there did drink and swallow down into her body several quantities of the said poison so mixed as aforesaid with the said tea; and the said C. E., of the poison aforesaid, and by the operation thereof, on the said fourteenth day of October, in the year last aforesaid, at Lycoming County aforesaid, became sick and greatly distempered in her body; of which said sickness and distemper, occasioned by the drinking, taking, and swallowing down into the body of the said C. E. of the poison aforesaid,

so mixed and mingled in the said tea as aforesaid, she the said C. E., from the said several days and times on which she had so drunk and swallowed down the same as aforesaid, until the said sixteenth day of October, in the year last aforesaid, at Lycoming County aforesaid, did languish, and languishing did live; on which said sixteenth day of October, in the year last aforesaid, at Lycoming County aforesaid, she the said C. E., of the poison aforesaid, so taken, drunk, and swallowed down as aforesaid, and of the sickness and distemper thereby occasioned, did die.

And so the inquest aforesaid, upon their oaths and affirmations respectively as aforesaid, do say, that the said J. E., her the said C. E., in the manner and by the means last aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(138) *Murder by giving to the deceased poison, and thereby aiding her in suicide.(c)*

That B. A., on, etc., at, etc., upon E. C., “feloniously, wilfully, and of his malice aforethought, did make an assault, and feloniously, wilfully, and of his malice aforethought, did give and administer to her two ounces weight of a deadly poison called laudanum, with intent that she should take and swallow the same down into her body (he knowing the same to be a deadly poison); and that the said E. C. the said laudanum so administered did take and swallow down into her body, and by reason thereof became mortally sick and distempered in her body, and of such mortal sickness and distemper then and there died.” (*Conclude as in book 1, chapter 3.*)

(138a) *Murder by administering cantharides with intent to ravish, under Indiana statute. Second count.*

The grand jurors aforesaid, for the county aforesaid, upon their oaths aforesaid, do further charge and present, that M. B. and W. Y., at, etc., on, etc., unlawfully, purposely, feloniously,

(c) This was approved in *R. v. Alison*, 8 C. & P. 418. As has already been observed (*supra*, notes to forms 97, 107), a party who is present aiding in the commission of a suicide becomes a principal in the offence, and may be indicted for the murder of the deceased, though the courts differ as to whether there can be accessories before the fact to suicide at common law. *Wh. Cr. L.* 8th ed. §§ 428 *et seq.*

and with premeditated malice, did kill and murder one S. I., a woman over the age of fourteen years, in an unlawful attempt, forcibly, feloniously, and against her will, to then and there ravish and have unlawful carnal knowledge of her, the said S. I. (the said M. B. and W. Y., and each of them, then and there having the present ability to ravish and carnally know her the said S. I.), by then and there purposely, wilfully, feloniously, unlawfully, and with premeditated malice, administering and causing to be administered unto the said S. I., a large quantity of a certain deadly poison, commonly known as and called cantharides, which said cantharides the said M. B. and W. Y., and each of them, had unlawfully, feloniously, and with premeditated malice, mixed and mingled with certain wine, unlawfully, purposely, wilfully, feloniously, and with premeditated malice, to be then and there, and at the county aforesaid, taken, drank, and swallowed down into the body of the said S. I.; they, the said M. B. and W. Y., and each of them, then and there intending and believing that the properties of the said cantharides aforesaid were such that, when drank down into the throat and body of the said S. I., it would create and greatly excite and increase her sexual passions, and create and excite in her a desire, which she could not control, to have sexual carnal intercourse with men, and they, the said M. B. and W. Y., and each of them, then and there and at the time and place aforesaid, believing such administration of said cantharides would, and thereby purposing and unlawfully intending that it should so excite and increase the sexual passions and desires for sexual intercourse with men in her, the said S. I., that she the said S. I., by the means and operations of the said cantharides upon her system, would so greatly desire to have sexual carnal intercourse with men, that she could not control her will, and resist the same, and that, by the unlawful means and operations of said cantharides aforesaid, so taken and swallowed down into her system, her the said S. I.'s will to resist having sexual intercourse with them would be then and there and thereby broken down and overcome, and they, the said M. B. and W. Y., and each of them, then and there and thereby be enabled to have unlawful sexual carnal intercourse with her, the said S. I., forcibly and against her will; and she, the said S. I., not know-

ing the said poison aforesaid had been mingled and mixed with said wine aforesaid, did take, drink, and swallow down into her body, then and there and at the time and place aforesaid, several large quantities of said poison aforesaid, the said M. B. and W. Y., and each of them, then and there well knowing that the said cantharides aforesaid, so mixed and mingled in said wine by them as aforesaid, was a deadly poison, and they, the said M. B. and W. Y., and each of them, then and there knowing the said cantharides to be a deadly poison, administered and caused the same to be administered, then and there unto the said S. I., a woman over the age of fourteen years, with the unlawful intent, then and there, at the time and place aforesaid, and by the means and operations of the poison as aforesaid, her, the said S. I., to unlawfully ravish and carnally know by force and against her will, the said M. B. and W. Y., and each of them, then and there having the present ability to unlawfully ravish and carnally know her, the said S. I., against her will, under and by the means and operations of the poison aforesaid, upon the system of the said S. I. aforesaid. And the grand jurors aforesaid, upon their oaths aforesaid, charge and present, that the said M. B. and W. Y., her, the said S. I., then and there and thereby, at the time, in the manner, and by the means aforesaid, and at the place aforesaid, feloniously, wilfully, unlawfully, and of premeditated malice, did kill and murder, etc., contrary, etc.(d)

(139) *Murder in the first degree in Ohio. By obstructing a railroad track.*(e)

That A. B., on, etc., unlawfully, wilfully, purposely, and of his deliberate and premeditated malice,(f) in and upon the track

(d) It was held that this indictment was sufficient as charging a murder by the administering of poison, but not of a murder in an attempt to commit a rape; the allegations in respect to the attempted rape being treated as mere surplusage. It was held, also, that the indictment sufficiently shows that the woman died of the poison administered to her, and that a *purpose* to kill the woman, on the part of the defendant, was sufficiently alleged. *Bechtelheimer v. State*, 54 Ind. 128. Wh. Cr. L. 8th ed. § 610. For administering chloroform see *infra*, 1056 c.

(e) This was sustained in Ohio in *State v. Brooks*, 9 West. L. J. 109; *Warren's C. L.* 13.

(f) Mr. Warren advises to aver, at this point, a purpose and intention to kill, or to inflict a mortal wound. *Fouts v. State*, 8 Ohio, 98; *Kain v. State*, 8 ib. 306; *Hagan v. State*, 10 Ohio St. R. 459; *Loeffner v. State*, 10 Ohio St. R. 599.

of a certain railroad, then and there being in operation, and known as and called the Cleveland and Pittsburg Railroad, a certain obstruction, called and being a plank of wood, of great length, breadth, and thickness, to wit, eight feet long, one foot wide, and three inches thick, then and there did put and place, by means of which said obstruction then and there so placed and put in and upon the said Cleveland and Pittsburg Railroad by the said A. B., as aforesaid, and by means of the force and velocity of a certain locomotive engine, called the Crab, then and there passing along and upon the track of the said Cleveland and Pittsburg Railroad, and running against and upon the said obstruction, so put and placed by the said A. B., as aforesaid, one M. N., then and there being and passing along the said railroad upon the locomotive aforesaid, he the said A. B., with great force and violence, thereby unlawfully, wilfully, purposely, and of his deliberate and premeditated malice,^(g) did then and there precipitate, cast, and throw from the said locomotive, so passing as aforesaid, to and upon the rails, ties, and other substances composing the track of said railroad, thereby then and there giving to the said M. N. one mortal concussion and jar, of which said mortal concussion and jar the said M. N. then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B., him the said M. N., in manner and form aforesaid, feloniously, unlawfully, wilfully, purposely, and of his deliberate and premeditated malice, did kill and murder. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said A. B., late of the county aforesaid, on, etc., at, etc., unlawfully, purposely, wilfully, and of his deliberate and premeditated malice, in and upon the track of a certain railroad then and there being in operation, and known as and called the Cleveland and Pittsburg Railroad, a certain obstruction then and there called and being a plank of wood, of great length, breadth, and thickness, to wit, eight feet long, one foot wide, and three inches thick, then and there did put and place,

^(g) This averment is necessary under the Ohio statute. It would be safer to add, "and with purpose and intent to kill and destroy," etc.

by means of which obstruction, then and there put and placed by the said A. B., in and upon the Cleveland and Pittsburg Railroad, and by means of the force and velocity of a certain locomotive engine called the Crab, then and there passing along said railroad, and running against and upon the said obstruction so placed by the said A. B. as aforesaid, one M. N., then and there being, and passing along said railroad, upon the locomotive aforesaid, he the said A. B., with great force and violence, did thereby, then and there, unlawfully, wilfully, purposely, and of his deliberate and premeditated malice, precipitate, cast, and throw from the said locomotive, to and upon the track of the railroad aforesaid, and with the said locomotive, the body of the said M. N. did run over and crush, thereby giving to the said M. N., in and upon the body of him the said M. N., one mortal crush and contusion, of which said mortal crush and contusion the said M. N. then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B., him the said M. N., in the manner and form aforesaid, unlawfully, wilfully, purposely, and of his deliberate and premeditated malice, did kill and murder. (*Conclude as in book 1, chapter 3.*)

- (140) *Murder in the first degree in Ohio, by sending to the deceased a box containing an iron tube, gunpowder, bullets, etc., artfully arranged so as to explode on attempting to open it.*(h)

That A. B., contriving one M. N. to deprive of his life, and him, the said M. N., purposely and of deliberate and premeditated malice to kill and murder, on, etc., with force and arms, at, etc., a certain wooden box, then and there containing an iron tube closed at both ends, and loaded and charged with gunpowder and ten leaden bullets and ten leaden slugs (which said box and its contents were then and there so constructed and arranged that, whenever any person should attempt to open the said box, the iron tube aforesaid, loaded and charged as aforesaid, would thereby instantly be exploded, and as well the said box as the said tube be broken into pieces, and the fragments of the said tube, together with the bullets and slugs aforesaid, be driven and shot forth), did, purposely and of delib-

(h) This indictment is given by Mr. Warren as having been sustained in Ohio. Warren's C. L. 16.

erate and premeditated malice, send and cause to be delivered to the said M. N., in the city and county aforesaid, with intent that he, the said M. N., should receive the said box, and should attempt to open the same, he the said A. B., then and there well knowing that the said tube, loaded and charged as aforesaid with gunpowder, bullets, and slugs, would be exploded whenever any person should attempt to open the said box, and that the explosion thereof would kill every such person; and the said M. N., not knowing the said box and its contents to have been so constructed and arranged as aforesaid, nor that the said box contained the said tube loaded and charged as aforesaid, or any other deadly or hurtful instrument or substance whatsoever, afterwards, on the day and year aforesaid, at the city and county aforesaid, by the procurement of the said A. B., did receive the said box, and did then and there attempt to open the same, and instantly, upon the said attempt of him, the said M. N., to open the said box, on the day and year aforesaid, at the city and county aforesaid, the iron tube aforesaid, contained within the said box, closed at both ends, and loaded and charged with gunpowder, bullets, and slugs, as aforesaid, was exploded, and thereby as well the said tube as the said box was then and there broken into pieces, and the fragments of the said tube, together with the bullets and slugs aforesaid, were then and there driven and shot forth; by means whereof and by force of the explosion of the gunpowder contained within the said tube, eight of the said bullets, and eight of the said slugs, driven and shot forth as aforesaid, did then and there strike and penetrate the inside of the right thigh of the said M. N., immediately below the groin, then and there giving to him the said M. N., in and upon the inside of the right thigh of him the said M. N., immediately below the groin, sixteen mortal wounds, each of the depth of five inches and of the breadth of one inch; and, also, by means whereof, and by force of the explosion of the gunpowder aforesaid, one fragment of the said iron tube, driven and shot forth as aforesaid, did then and there strike and mortally lacerate the abdomen and bowels of him the said M. N., for the space of six inches in length and breadth, and four inches in depth; of which said mortal wounds and contusion and laceration, he, the said M. N., from the said

twenty-sixth day of June, in the year aforesaid, until the twenty-seventh day of June in the same year, at the city and county aforesaid, languished, and languishing did live; on which twenty-seventh day of June, in the year aforesaid, at the city and county aforesaid, he, the said M. N., of the mortal wounds and laceration aforesaid, died: And so the jurors aforesaid, on their oaths aforesaid, do say, that the said A. B., him, the said M. N., in manner and form aforesaid, at the city and county aforesaid, purposely, and of deliberate and premeditated malice, did kill and murder. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said A. B., contriving one M. N. to deprive of his life, and him the said M. N. purposely, and of deliberate and premeditated malice, to kill and murder, on, etc., with force and arms, at, etc., a certain wooden box, then and there containing an iron tube closed at both ends, and loaded and charged with gunpowder and ten leaden bullets and ten leaden slugs, and which said box, between said iron tube, so contained and loaded and charged as aforesaid within said box, and the sides of the said box, was then and there also loaded and charged with gunpowder and twenty leaden bullets and twenty leaden slugs (which said box and its contents were then and there so constructed and arranged that, whenever any person should attempt to open the same, the iron tube aforesaid, loaded and charged as aforesaid, as well as the gunpowder aforesaid, so placed as aforesaid between the said iron tube and the sides of the said box would thereby instantly be exploded, and as well the said box as the said tube be broken into pieces, and the fragments of the said tube, together with the bullets and slugs aforesaid, as well those within the said tube as those between the said tube and the sides of the said box, be driven and shot forth), did purposely and of deliberate and premeditated malice send and cause to be delivered to the said M. N., in the city and county aforesaid, with intent that he, the said M. N., should receive the said box and should attempt to open the same; he, the said A. B., then and there well knowing that the said tube, loaded and charged as aforesaid, with gunpowder, bullets, and slugs, as well as the gunpowder aforesaid, so placed as aforesaid between

the said iron tube and the sides of the said box, would be exploded whenever any person should attempt to open the said box, and that the explosion thereof, to wit, the iron tube, and the gunpowder between the said iron tube and the sides of the said box, would kill every such person; and the said M. N., not knowing the said box and its contents to have been so constructed and arranged as aforesaid, nor that the said box contained the said tube, loaded and charged as aforesaid, nor that the said box contained the gunpowder, leaden bullets, and leaden slugs aforesaid, placed as aforesaid between the said iron tube and the sides of the said box, or any other deadly or hurtful instrument or substance whatsoever, afterwards, on the day and year aforesaid, at the city and county aforesaid, by the procurement of the said A. B., did receive the said box, and did then and there attempt to open the same; and instantly upon the said attempt of him the said M. N., to open the said box, on the day and year aforesaid, at the city and county aforesaid, the iron tube aforesaid, contained within the said box, closed at both ends, and loaded and charged with gunpowder, bullets, and slugs, as aforesaid, and the gunpowder aforesaid, so contained as aforesaid between the said iron tube and the sides of the said box, were thereby exploded, and thereby as well the said tube as the said box was then and there broken into pieces, and the fragments of the said tube, together with the bullets and slugs aforesaid, as well those within the said tube as those contained as aforesaid between the said tube and the sides of the said box, were then and there driven and shot forth; by means whereof, and by force of the explosion of the gunpowder contained within said tube, and by force of the explosion of the gunpowder contained as aforesaid, between said tube and the sides of the said box, eight of the said bullets and eight of the said slugs, contained as aforesaid within said tube, and between said tube and the sides of the said box, driven and shot forth as aforesaid, did then and there strike and penetrate the inside of the right thigh of the said M. N., immediately below the groin, then and there giving to him, the said M. N., in and upon the inside of the right thigh of him the said M. N., immediately below the groin, sixteen mortal wounds, each of the depth of five inches, and of the breadth of one inch, and, also, by means

whereof, and by force of the explosion of the gunpowder aforesaid, one fragment of the said iron tube, driven and shot forth as aforesaid, did then and there strike, and mortally wound and lacerate the abdomen and bowels of him the said M. N., for the space of six inches in length and breadth and four inches in depth; of which said mortal wounds and laceration, he the said M. N., from the said twenty-sixth day of June, in the year aforesaid, until the twenty-seventh day of June, in the same year, at the city and county aforesaid, languished, and languishing did live; on which said twenty-seventh day of June, in the year aforesaid, at the city and county aforesaid, he the said M. N., of the mortal wounds and laceration aforesaid, died: And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said A. B., him the said M. N., in manner and form aforesaid, at the city and county aforesaid, purposely, and of deliberate and premeditated malice, did kill and murder. (*Conclude as in book 1, chapter 3.*)

- (141) *Murder in the first degree in Ohio—by a father, chaining and confining his infant daughter several nights during cold weather without clothing or fire.*(i)

That A. B. feloniously, unlawfully, purposely, maliciously, and of his deliberate and premeditated malice, contriving and intending one M. N. (she the said M. N. then and there being the infant daughter of him the said A. B.) to kill and murder, on, etc., and on divers other days and times between, etc., with force and arms, at the county of Shelby aforesaid, in and upon the said M. N., his infant daughter as aforesaid, in the peace of the State of Ohio then and there being, unlawfully, feloniously, purposely,(j) and of his deliberate and premeditated malice, did make divers assaults; and that the said A. B. did then and there bind and fasten a certain iron chain around the neck of

(i) Mr. Warren gives the above as having been sustained in Ohio. Warren's C. L. 23.

(j) It is essential that the intent and purpose to kill should be specifically averred in the *description of this crime*; and the failure to do this is not cured by an averment of purpose as to the assault, or in the general conclusion. *Fouts v. State*, 8 Ohio St. R. 98. Wh. Cr. L. 8th ed. § 543.

It is enough, however, to allege that the accused "*purposely*, and of deliberate and premeditated malice, assaulted, cut, and stabbed" the deceased, "thereby then and there *purposely*, and of deliberate and premeditated malice, giving" to the said deceased, "a mortal wound," etc., *Loeffner v. State*, 10 Ohio St. R. 599.

her the said M. N., and with and by means of said chain, her the said M. N., then and there, in a certain room, in the dwelling-house of him the said A. B. there situate, feloniously, unlawfully, purposely, maliciously, and of his deliberate and premeditated malice, did chain, confine, and imprison; and that the said A. B., during the night season of each day, from the said, etc., until the said, etc., with force and arms, at the county of Shelby aforesaid, did feloniously, unlawfully, purposely, maliciously, and of his deliberate and premeditated malice, with the chain aforesaid, confine and imprison her the said M. N., in his room aforesaid, without fire and without clothing, or other means of protection from the cold, and that during all the said time the weather was cold, inclement, freezing weather; and that the said A. B., from the said, etc., until the said, etc., with force and arms, at the county of Shelby aforesaid, feloniously, unlawfully, purposely, maliciously, and of his deliberate and premeditated malice, did neglect, omit, and refuse to give, provide, and furnish, and to permit and suffer to be given, provided, and furnished to her, the said M. N., his infant daughter as aforesaid, so chained, imprisoned, and confined as aforesaid, sufficient clothing, fire, or other means of warmth and comfort, necessary to preserve and protect her, the said M. N., from freezing and perishing with the said cold; by means of which said imprisonment and confinement, and also of such neglecting and refusing to give, provide, and furnish, and to permit and suffer to be given, provided, and furnished, to her the said M. N., such clothing, fire, or other means of warmth and comfort as were sufficient and necessary for the preservation and protection of her, the said M. N., from freezing and perishing with and of the cold, she, the said M. N., then and there became and was sick, chilled, and frozen; and from the said, etc., until the said, etc., at the county of Shelby aforesaid, of the said exposure to cold, chilling, freezing, and confinement, she, the said M. N., died; and so the grand jurors aforesaid, upon their oaths aforesaid, do say, that the said A. B., her, the said M. N., in manner and form aforesaid, at the county aforesaid, feloniously, unlawfully, purposely, and of his deliberate and premeditated malice (and with intent and purpose to kill and murder), did kill and murder. (*Conclude as in book 1, chapter 3.*)

(142) *Second count, not alleging a chaining.*

That the said A. B., feloniously, unlawfully, purposely, and of his deliberate and premeditated malice, contriving and intending the said M. N. (she the said M. N., then and there being the infant daughter of him the said A. B.) to kill and murder, on, etc., and on divers other days and times between that day and, etc., with force and arms, at the county of Shelby aforesaid, in and upon the body of the said M. N., in the peace of the State of Ohio then and there being, unlawfully, feloniously, purposely, and of his deliberate and premeditated malice, did make divers assaults; and the said A. B., on the said, etc., and from said last named day until, etc., with force and arms, at the county aforesaid, her, the said M. N., in a certain room of the dwelling-house of the said A. B., there situate, unlawfully, feloniously, purposely, and of his deliberate and premeditated malice, did confine and imprison, and from the said, etc., until, etc., with force and arms, at the county aforesaid, the said A. B. did feloniously, unlawfully, purposely, maliciously, and of his deliberate and premeditated malice, neglect, omit, and refuse to give and administer, and to permit to be given and administered to the said M. N., sufficient meat and drink necessary for the proper and healthful sustenance, support, and maintenance of the body of her the said M. N.; and that the said A. B., on the said, etc., and from the said last named day until, etc., with force and arms, at the county aforesaid, feloniously, unlawfully, purposely, and of his deliberate and premeditated malice, did neglect and refuse to provide, furnish, and administer, and to suffer and permit to be provided, furnished, and administered, to her the said M. N., fire, wearing apparel, bed and bedding, or other means of warmth, protection, and comfort, sufficient and necessary to protect and preserve her, the said M. N., from becoming sick and chilled; she, the said M. N., then and there being so confined and imprisoned by the said A. B., as aforesaid, and the weather being then and there cold and inclement; by means of which said confinement and imprisonment, and also of such neglecting and refusing to give, furnish, provide, and administer, and to suffer and to permit to be given, provided, and administered, to

her, the said M. N., such meat and drink as were sufficient and necessary for the health and proper support, sustenance, and maintenance of the body of her, the said M. N., and also by means of such neglecting and refusing to furnish, provide, and administer, and to suffer and permit to be furnished, provided, and administered to her, the said M. N., such fire, wearing apparel, bed and bedding, or other means of protection, warmth, and comfort, sufficient and necessary to protect her, the said M. N., from becoming sick and chilled, she, the said M. N., from the said, etc., until the said, etc., at the county of Shelby aforesaid, did languish, and languishing did live; on which said, etc., she, the said M. N., at the county aforesaid, of the said imprisonment, deprivation of meat and drink, fire, clothing, bed and bedding, or the means of warmth and comfort, died; and so the grand jurors aforesaid do say, that the said A. B., in manner and form aforesaid, feloniously, unlawfully, purposely, maliciously, and of his deliberate and premeditated malice aforethought, her, the said M. N., did kill and murder. (*Conclude as in book 1, chapter 3.*)

(142a) *By stabbing, under Ohio statute.(k)*

That J. L., on, etc., at, etc., with force and arms, in and upon one N. H., in the peace of God and the laws of this State then and there being, purposely, and of deliberate and premeditated malice, did make an assault; and that the said J. L., with a certain knife which he the said J. L. in his right hand then and there held, then and there him, the said N. H., in and upon, etc. (*describing spot*), of him the said N. H., then and there purposely and of deliberate and premeditated malice, did strike, cut, and stab, thereby then and there, with the knife aforesaid, giving to him the said N. H., in and upon (*stating spot*) of him, the said N. H., purposely and of deliberate and premeditated malice, one mortal wound, of the length of four inches, and of the depth of six inches; of which said mortal wound, so as aforesaid purposely and of deliberate and premeditated malice given, by the said J. L. to the said N. H., he the said N. H., on the day aforesaid, and in the year aforesaid, and at the county

(k) This was sustained in *Loeffner v. State*, 10 Ohio St. 598.

aforesaid, instantly died. And so the jurors aforesaid, upon their oaths and affirmations aforesaid, do say, that he the said J. L., him the said N. H., in manner and by the means aforesaid, on the day and in the year aforesaid, and at the county aforesaid, purposely and of deliberate and premeditated malice, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(143) *By forcing a sick person into the streets.*(l)

That A. B., of, etc., intending one C. D. feloniously, wilfully, and of his malice aforethought, to kill and murder, on at with force and arms, at an unseasonable hour in the night, to wit, about the hour of eleven in the night of the same day, in and upon the said C. D., he the said C. D. then and there being in extreme sickness and weakness of body, occasioned by fever, and then and there confined to his bed in the dwelling-house of him the said A. B., there situate, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said A. B. him the said C. D., from out of the said bed, and also out of the said dwelling-house, into the public and open street there, did then and there feloniously, wilfully, and of his malice aforethought, remove, force, and drive, and there abandon and leave; he the said A. B. then and there well knowing the said C. D. to be then in extreme sickness and weakness of body, occasioned by the fever aforesaid; by means whereof, he the said C. D., through the cold and the inclemency of the weather, and for want of due care and other necessities requisite for a person in such sickness and weakness as aforesaid, then and there died; and so the jurors aforesaid, upon their oaths aforesaid, do say, that the said A. B., him the said C. D., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(144) *Murder of an infant by suffocation.*(m)

That on the twenty-sixth day of June, etc., M. H., etc. (*setting forth addition, birth of child, etc., and proceeding*): on the said

(l) 3 Chit. C. L. 771; Davis's Precedents, 189.

(m) R. v. Huggins, 3 C. & P. 414. Three exceptions were taken to this inquisition: 1st. That the time was imperfectly stated; 2d. That there was no

child "did make an assault; and that the said M. H., her the said new-born child, with both her hands, in a certain piece of flannel of no value, then and there feloniously, wilfully, and of her malice aforethought, did wrap up and fold, by means of which said wrapping up and folding the said new-born female bastard child in the piece of flannel aforesaid, she the said new-born female child was then and there suffocated and smothered; of which said suffocation and smothering she the said new-born female child, then and there instantly died; and so the jurors aforesaid," etc.

(145) *Murder by stamping, beating, and kicking.*

That T. V. Jr., late of the said county, yeoman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on, etc., at, etc., in and upon one N. R., in the peace of God and the commonwealth, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said T. V. Jr., then and there with both his hands, the said N. R., in and upon the head, neck, and breast of him the said N. R., feloniously, wilfully, and of his malice aforethought, did strike and beat; and that the said T. V. Jr., then and there, with both his hands and feet, the said N. R., so and upon the ground, feloniously, wilfully, and of his malice aforethought, did knock, cast, and throw; and the said N. R., so on the ground lying and being, he the said T. V. Jr., with both his hands, knees, and feet, in and upon the head, neck, breast, stomach, back, and sides of him the said N. R., did then and there feloniously, wilfully, and of his malice aforethought, strike, beat, press, and kick; and that the said T. V. Jr., then and there the said N. R., by and upon the neck and throat of him the said N. R., with both the hands of him the said T. V. Jr., did feloniously, wilfully, and of his malice aforethought, grasp and seize, thereby choking and strangling the said N. R., and by the said striking, beating, casting, throwing, pressing, and kicking, giving to the said N.

imputation to the prisoner of any act sufficient to cause death; and 3d. That there was a variance in the name of one of the grand jury. Vaughan, B., quashed the inquisition on the latter ground, holding that the indictment was itself good.

R. several mortal bruises; of which said several mortal bruises, choking, and strangling, the said N. R. then and there instantly died.

And so the inquest aforesaid, on their oaths and affirmations aforesaid, do say, that the said T. V. Jr., the day and year aforesaid, at Chester County aforesaid, in manner and form aforesaid, the said N. R., feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(146) *Murder by beating with fists and kicking on the ground, no mortal wound being discovered.*(n)

That W. W., late of, etc., on, etc., at, etc., with force and arms, at aforesaid, etc., in and upon one E. D., in the peace of God and the said commonwealth, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said W. W. then and there feloniously, wilfully, and of his malice aforethought, did strike, beat, and kick the said E. D. with his hands and feet, in and upon the head, breast, back, belly, sides, and other parts of the body of him the said E. D., and did then and there feloniously, wilfully, and of his malice aforethought, cast and throw the said E. D. down unto and upon the ground with great force and violence there, giving unto the said E. D. then and there, as well by the beating, striking, and kicking of him the said E. D., in manner and form aforesaid, as by the casting and throwing of him the said E. D. down as aforesaid, several mortal strokes, wounds, and bruises in and upon the head, breast, back, belly, sides, and other parts of the body of him the said E. D., of which said mortal strokes, wounds, and bruises he the said E. D., from, etc., until, etc., at, etc., did languish, and languishing did live; on which said day of in the year aforesaid, the said E. D., at, etc., of the several mortal strokes, wounds, and bruises aforesaid, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said W. W. him the said E. D., in the manner and by the means aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(n) Stark. C. P. 419.

(147) *For stabbing, casting into the sea, and drowning the deceased on the high sea, etc.(o)*

The jurors, etc., upon their oath present, that A. B. (*and others, naming them*), being citizens of the United States, on upon the high sea, out of the jurisdiction of any particular state, in and on board a certain schooner, the name of which is to the jurors aforesaid unknown, in and upon one C. D., a mariner in and on board said vessel, piratically and feloniously did make an assault, and that he the said A. B., with a certain steel dagger, which he the said A. B. in his hand then and there had and held, the said C. D., in and upon the breast of him the said C. D., upon the high sea, and on board the schooner aforesaid, and out of the jurisdiction of any particular state, piratically and feloniously did strike and thrust, giving to the said C. D., in and upon the breast of him the said C. D., upon the high sea aforesaid. in and on board the said schooner, and out of the jurisdiction of any particular state, piratically and feloniously, in and upon the breast of him the said C. D., several grievous, dangerous, and mortal wounds; and did then and there, in and on board the schooner aforesaid, upon the high sea, and out of the jurisdiction of any particular state, piratically and feloniously, him the said C. D. cast and throw from out of the said schooner into the sea, and plunge, sink, and drown him in the sea aforesaid; of which said mortal wounds, casting, throwing, plunging, sinking, and drowning, the said C. D., in and upon the high sea aforesaid, out of the jurisdiction of any particular state, then and there instantly died. And the jurors aforesaid, upon their oath aforesaid, do say, that, by reason of the casting and throwing the said C. D. in the sea as aforesaid, they cannot describe the said mortal wounds. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. (*and others*) him the said C. D., then and there, upon the high sea aforesaid, out of the jurisdiction of any particular state, in manner and form aforesaid, piratically and feloniously did kill and murder, against, etc. (*Conclude as in book 1, chapter 3.*)

(o) Davis's Prec. 228. This was the form in *U. S. v. Holmes*, 5 Wheat. 412.

(148) *Knocking to the ground, and beating, kicking, and wounding.*(p)

That R. M., late of the parish of Wakefield, in the county of York, laborer, and B. M., late of the same place, laborer, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on, etc., with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one J. D., in the peace of God and our said lord the king, then and there being, feloniously, wilfully, and of their malice aforethought, did make an assault; and that they, the said R. M. and B. M., then and there feloniously, wilfully, and of their malice aforethought, did with great force and violence pull, push, cast, and throw the said J. D. down unto and upon the ground there, and that the said R. M. and B. M., with both the hands and feet of them the said R. M. and B. M., then and there, and whilst the said J. D. was so lying and being upon the ground, him the said J. D., in and upon the head, stomach, breast, belly, back, and sides of him the said J. D., then and there feloniously, wilfully, and of their malice aforethought, divers times with great force and violence did strike, beat, and kick, and that the said R. M. and B. M., with both the hands, feet, and knees of them, the said R. M. and B. M., and each of them, then and there, and whilst the said J. D. was so lying and being upon the ground as aforesaid, him the said J. D., in and upon the belly, head, stomach, and sides of him the said J. D., then and there feloniously, wilfully, and of their malice aforethought, did with great force and violence strike, push, press, and squeeze, giving to the said J. D., then and there, as well by the pulling, pushing, casting, and throwing of him the said J. D. down unto and upon the ground as aforesaid, and by the striking, beating, and kicking of him the said J. D., whilst he was so lying and being upon the ground as aforesaid, in and upon the head, stomach, breast, belly, back, and sides of him the said J. D. as aforesaid, as also by the striking, pushing, pressing, and squeezing of him the said J. D., whilst he the

(p) *R. v. Mosley*, 1 Mood. C. C. 98. This form was sustained by the twelve judges, it being held that it is not necessary to set forth the length, depth, or breadth of the wound.

said J. D. was so lying and being upon the ground as aforesaid, in and upon the belly, breast, stomach, and sides of him the said J. D., with the hands, knees, and feet of them, the said R. M. and B. M., in manner aforesaid, several mortal bruises, lacerations, and wounds in and upon the belly, breast, stomach, and sides of him the said J. D.; of which said several mortal bruises, lacerations, and wounds the said J. D., from the said, etc., until, etc., in the parish aforesaid, in the county aforesaid, did languish, and languishing did live; on which, etc., the said J. D., at the parish aforesaid, in the county aforesaid, of the said several mortal bruises, lacerations, and wounds, died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said R. M. and B. M. him the said J. D. in manner and form and by the means aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(149) *Murder by striking with stones.*(q)

That J. D., late of, etc., laborer, J. P., late of, etc., laborer, and C. T., late of, etc., laborer, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the sixteenth July, 4 Geo. IV., with force and arms, at, etc., in and upon one W. W., in the peace, etc., then and there being, feloniously, wilfully, and of their malice aforethought, did make an assault; and that the said J. D., J. P., and C. T., with certain stones of no value, which they the said J. D., J. P., and C. T. in their right hands then and there had and held, in and upon the back part of the head of him the said W. W. then and there feloniously, wilfully, and of their malice aforethought, did cast and throw, and that the said J. D., J. P., and C. T., with the stones aforesaid, so as aforesaid cast and thrown, the aforesaid W. W., in and upon the back part of the head of him the said W. W., then and there feloniously, wilfully, and of their malice aforethought, did strike, penetrate, and wound, then and there giving to the said W. W., by the

(q) *R. v. Dale*, 9 Moore, 19. An arrest of judgment was asked, first, because the number of stones was uncertain; and, secondly, because it was not stated in which hand of the several defendants they were held. The twelve judges, however, held the indictment good, and the prisoner was executed. See *supra*, notes to form 117.

casting and throwing of the stones aforesaid, in and upon the back part of the head of him the said W. W., one mortal wound, bruise, fracture, and contusion, of the breadth of one inch, and of the depth of half an inch, of which said mortal wound, bruise, fracture, and contusion he the said W. W., then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. D., J. P., and C. T. him the said W. W., in the manner and by the means aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, against the peace, etc.(r)

(150) *Murder by casting a stone.(s)*

That A. B., late of the said yeoman, on the day of in the year of our Lord one thousand, etc., with force and arms, at aforesaid, in the county aforesaid, in and upon one M., in the peace of God and of the said commonwealth, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said A. B., a certain stone of no value, which he the said A. B. in his right hand then and there had and held, in and upon the right

(r) On the verdict of guilty being recorded, Mr. D. F. Jones moved in arrest of judgment, that the indictment was defective in form on the following grounds: First, that after the words "certain stones" there should have been a *videlicet* mentioning the number of stones. Secondly, that it was not expressed in what hand they were held by each of the defendants. And, lastly, that the mode of causing the death was not properly stated.

Judgment was accordingly respited, and the above points reserved for the consideration of the twelve judges, and were now argued for the prisoner, Dale, by Mr. D. F. Jones, who cited as to the first, *The King v. Beech*, 1 Leach C. C. 3d ed. 159; Hale's P. C. vol. ii. pp. 182, 185. Secondly, Hale's P. C. vol. ii. p. 185; *Cuppelick's case*, 44 Eliz. K. B.; *Ld. Sanchar's case*, 9 Rep. 119.

[Ld. Chief Justice Abbott. It is very possible that ten stones may produce one mortal wound.]

[Mr. Justice Bayley. If a man give two blows they may only produce one wound; and it cannot be for a moment supposed that it would be necessary to allege the number of shots in a gun, and they receive an impetus from the gun as stones thrown by the hand.]

Thirdly, a case before Mr. Justice Chambre, at the Spring Assizes at York, 1806.

[Mr. Justice Holroyd. The verbs cast and throw may be used either in an active or neuter sense, as to throw at backgammon, or with dice, or to cast or throw with a net into the sea; and the latter part of this indictment shows that they had been used in the latter sense.]

Mr. J. Park was to have argued on the part of the crown; but the judges were unanimously of opinion that the conviction was right.

The convict was afterwards executed.

(s) Stark. C. P. 424. See *R. v. Dale*, 1 Mood. C. C. 5.

side of the head, near the right temple of her the said M., then and there feloniously, wilfully, and of his malice aforethought, did cast and throw; and that the said A. B., with the stone aforesaid, so as aforesaid cast and thrown, the aforesaid M., in and upon the right side of the head, near the right temple of her the said M., then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound; giving to the said M., by the casting and throwing of the stone aforesaid, in and upon the right side of the head near the right temple of her the said M., one mortal wound, of the length of one inch, and of the depth of one inch, of which said mortal wound she the said M., from the said day of in the year aforesaid, until the day of in the same year, at aforesaid, at the county aforesaid, did languish, and languishing did live; on which said day of in the year aforesaid, the said M., at aforesaid, in the county aforesaid, of the said mortal wound died. And so the jurors aforesaid, upon their oath (*or oaths and affirmations*) aforesaid, do say, that the said A. B., her the said M., in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(151) *Murder by striking with a stone.(t)*

That E. W., not having the fear of God before his eyes, etc., on the twenty-third day of July, one thousand eight hundred and twelve, with force and arms, at, etc., in and upon one S. S., in the peace of God, etc., then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said E. W. (*with*) a certain stone of no value, which he the said E. W. in his right hand then and there had and held, in and upon the right side of the head near the right temple of him the said S. S., then and there feloniously, wilfully, and of his malice aforethought, did cast and throw;

(*t*) *White v. Com.*, 6 Binn. 179. The first objection to this count arising from the interpolation of the word "with" in the sixth line, was treated by the court as arising from a clerical error, and as not so far affecting the sense of the averment as to vitiate it. It is not necessary, it was also said, to distinguish between the two degrees in an indictment for homicide. So far as the indictment was concerned, the judgment of the court below on a verdict of murder in the first degree was sustained.

and that he the said E. W., with the stone aforesaid, so as aforesaid cast and thrown, the aforesaid S. S., in and upon the right side of the head near the right temple of him the said S. S., then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, giving to the said S. S., by the casting and throwing of the stone aforesaid, in and upon the right side of the head, etc., one mortal wound, of the length of two inches, and of the depth of one inch, of which said mortal wound the said S. S. then and there instantly died; and so the jurors aforesaid, upon their oaths, etc., say, that the said E. W., him the said S. S., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(152) *By striking with an axe on the neck.*(u)

That J. M., late of said county, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on, etc., with force and arms, at, to wit, in the county of Jackson aforesaid, in and upon one S. W., in the peace of God and the State, then and there being, feloniously, wilfully, unlawfully, and of his malice aforethought, did make an assault; and the said J. M. with a certain axe made of iron and steel, of the value of one dollar, which he the said J. M. in both his hands then and there held, the said S. W., in and upon the right side of the neck of him the said S. W., between the head and shoulder of him the said S. W., then and there unlawfully and of his malice aforethought, did strike, thrust, and penetrate, giving to the said S. W., then and there, with the said axe aforesaid, in and upon the right side of the neck of him the said S. W., between the head and shoulder of him the said S. W., one mortal wound, of the length of ten inches, and of the depth of four inches, of which said mortal wound the said S. W., in the county of Jackson aforesaid, on the day aforesaid, and the year aforesaid, did instantly die; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. M., the said S. W., in manner and

(u) This form was sustained in *Mitchell v. State*, 8 Yerg. 515.

form aforesaid, unlawfully, and of his malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(153) *By striking with a knife on the hip, the death occurring in another state.*(v)

That W. D., late of the said county of Stokes, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on, etc., with force and arms, in the county aforesaid, in and upon one A. H., in the peace of God and the state, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said W. D., with a certain knife of the value of sixpence, which he the said W. D. in his right hand then and there had and held, the said A. H., in and upon the right hip and the left side of the back near the back-bone of him the said A. H., then and there, feloniously, wilfully, and of his malice aforethought, did strike and thrust, giving to the said A. H., then and there with the knife aforesaid, in and upon the said right hip and the left side of the back near the back-bone of the said A. H., several mortal wounds, each of the breadth of three inches, and of the depth of six inches, of which said several mortal wounds the said A. H., from the said, etc., in the year aforesaid, until, etc., as well as in the county aforesaid, as in the county of Patrick, in the state of Virginia, did languish, and languishing did live; on which said twenty-ninth day of August, in the year aforesaid, the said A. H., in the said county of Patrick, in the state of Virginia, of the said several mortal wounds died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said W. D., the said A. H., in manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(155) *Murder by stabbing with a knife.*(w)

That A. B., late of the said county, yeoman, on the day

(v) In this form, which was sustained in North Carolina, *State v. Dunkley*, 3 Iredell, 117, the statutory conclusion was omitted; and the same feature was sustained in *Com v. White*, 6 Binn. 183. See *supra*, concluding note to form 114.

(w) Stark. C. P. 424. See form for "Cutting Throat," *supra*, 116.

of in the year of our Lord, etc., with force and arms, at
 aforesaid, in the county aforesaid, in and upon one J. M.,
 in the peace of God and of the said state, then and there being,
 feloniously, wilfully, and of his malice aforethought, did make
 an assault, and that he the said A. B., with a certain knife of
 the value of sixpence, which he the said A. B., in his right hand
 then and there had and held, the said J. M., in and upon the
 left side of the belly, between the short ribs of him the said
 J. M., then and there feloniously, wilfully, and of his malice
 aforethought, did strike and thrust, giving to the said J. M.,
 then and there, with the knife aforesaid, in and upon the afore-
 said left side of the belly, between the short ribs of him the
 said J. M., one mortal wound, of the breadth of three inches,
 and of the depth of six inches, of which said mortal wound the
 said J. M., from the said day of in the year afore-
 said, until the day of in the same year, at
 aforesaid, in the county aforesaid, did languish, and languishing
 did live; on which said day of in the year aforesaid,
 the said J. M., at aforesaid, in the county aforesaid, of
 the said mortal wound died. And so the jurors aforesaid, upon
 their oath aforesaid, do say, that the said A. B., him the said
 J. M., in the manner and by the means aforesaid, feloniously,
 wilfully, and of his malice aforethought, did kill and murder.
(Conclude as in book 1, chapter 3.)

(156) *Murder. Against J. T. for shooting the deceased, and against
 A. S. for aiding and abetting.*(x)

That J. T., late, etc., and A. S., late, etc., on the day of
 in the year, etc., with force and arms, at aforesaid,
 in the county aforesaid, in and upon one S. G., in the peace of
 God, and of our said lord the king, then and there being, felo-
 niously, wilfully, and of their malice aforethought, did make
 an assault; and that the said J. T., a certain gun called a car-
 bine, of the value of ten pounds, then and there charged with
 gunpowder and a leaden bullet, which said gun he the said J. T.,

(x) Stark. C. P. 423; R. v. Taylor and Shaw, Leach, 398. A. S. was found guilty and J. T. acquitted; and a majority of the judges were of opinion that the conviction of A. S. was good, but the prisoner afterwards received a free pardon. See Stark. C. P. 88, 89.

See for other forms for "Shooting," *supra*, 115, 117.

in both his hands then and there had and held, at and against the said S. G., then and there feloniously, wilfully, and of his malice aforethought, did shoot off and discharge; and that the said J. T., with the leaden bullet aforesaid, by means of shooting off and discharging the said gun so loaded, to, at, and against the said S. G. as aforesaid, did then and there feloniously, wilfully, and of his malice aforethought, strike, penetrate, and wound the said S. G., in and upon the right side of the head of him the said S. G., near his right temple, giving to him the said S. G., then and there, with the leaden bullet aforesaid, by means of shooting off and discharging the said gun so loaded, to, at, and against the said S. G., and by such striking, penetrating, and wounding the said S. G., as aforesaid, one mortal wound in and through the head of him the said S. G., of which said mortal wound the said S. G. did then and there instantly die; and that the said A. S., then and there feloniously, wilfully, and of his malice aforethought, was present aiding, helping, abetting, comforting, assisting, and maintaining the said J. T. the felony and murder aforesaid, in manner and form aforesaid, to do and commit, etc. etc. (*Conclude as in book 1, chapter 3.*)

(156a) *Murder in producing abortion.*

That W. H. B., etc., “did unlawfully, feloniously, and wilfully use a certain instrument called a gum-bougie, by then and there forcing, thrusting, and inserting the said instrument, called a gum-bougie, into the womb and private parts of one M. N., then and there being a woman pregnant with child, and in the peace of the people, with intent then and there to produce the miscarriage of the said M. N., and did thereby, unlawfully, feloniously, and wilfully, with malice aforethought, cause the miscarriage of said M. N., it not being then and there necessary to cause such miscarriage for the preservation of the life of said M. N. (the said W. H. B. then and there well knowing that the use of said instrument as aforesaid, at the time aforesaid, in the manner aforesaid, would produce such miscarriage); by reason whereof the said M. N., from the said sixth day of May, in the year aforesaid, until, etc., did languish, and languishing did live; on which, etc., in the year aforesaid, at the county aforesaid, the said M. N. died.”

In the fifth count it was charged, that the said W. H. B. "did then and there, unlawfully and feloniously, and of his malice aforethought, administer to one M. N., then and there being a woman pregnant with child, in the peace of the people then and there being, a certain noxious and abortifacient drug, the name of which said noxious and abortifacient drug is to the grand jurors unknown, with intent then and there to produce the miscarriage of the said M. N., it not being then and there necessary to administer said noxious and abortifacient drug, the name of which is to the grand jurors unknown, for the preservation of the life of the said M. N."(*y*)

(157) *Murder of a bastard child.*(*z*)

That A. B., late of, etc., spinster, on, etc., being big with a male child, on, etc., at, etc., by the providence of God, did bring forth the said child alive,^(a) of the body of her the said A. B., alone^(b) and in secret; which said male child, so being born alive, by the laws of this realm, was a bastard; and that the said A. B. afterwards, to wit, on, etc., as soon as the said male bastard child was born, with force and arms, at, etc., in and upon the said child, feloniously, wilfully, and of her malice aforethought, did make an assault; and that she the said A. B., with both her hands about the neck of him the said child, then and there fixed, him the said child, then and there feloniously, wilfully, and of her malice aforethought, did choke and strangle, of which said choking and strangling, the said child then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B., him the said male bastard

(*y*) On the above counts, it was held in Illinois, that the exception in the statute, providing that "unless the same were done as necessary for the preservation of the mother's life," was sufficiently negatived. *Beasley v. People*, 89 Ill. 571.

(*z*) Stark. C. P. 405. As to concealing bastard child, see *infra*, 183-4, 5.

(*a*) If upon view of the child, it be testified by one witness, by apparent probabilities, that the child was not come to its *debitum partus tempus*, as if it have no hair or nails, or other circumstances; "this" (says Lord Hale) "I have always taken to be a proof by one witness, that the child was born dead, so as to leave it nevertheless to the jury, as upon a common law evidence, whether she were guilty of the death or not." Stark. C. P. 406. According to Mr. Starkie (*ut sup.*), the sex is material.

(*b*) These words do not appear to be necessary. *Ib.*

child, in form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder, against the peace, etc.

(157a) *Same under Maine statute.*

“That S. M. of P., single woman, on, etc., at, etc., being pregnant with a male child, did then and there bring forth the said male child alive of the body of her the said S. M., alone and in secret, which said male child being so born alive was by the laws of said state a bastard, and that afterwards, to wit, on, etc., she the said S. M., with force and arms, at, etc., in and upon the said male child, in the peace of said state then and there being, feloniously, wilfully, and of her malice aforethought, did make an assault, and the said male child, she the said S. M., did then and there feloniously, wilfully, and of her malice aforethought, kill and murder, against the peace,” etc.

Second count.

“And the jurors aforesaid, upon their oaths aforesaid, do further present, that said S. M., otherwise known by the name of S. W., single woman, on, etc., at, etc., with force and arms, in and upon an infant child by name to said jurors unknown, in the peace of said state, then and there being, feloniously, wilfully, and of her malice aforethought, did make an assault, and the said infant child then and there feloniously, wilfully, and of her malice aforethought, did kill and murder, against the peace,” etc.(c)

(c) *State v. Morrissey*, 70 Me. 401. PETERS, J. “The first count is the copy of a form provided by an English statute (St. 14 and 15 Vict. c. 100, § 4), adopted by our legislature (Laws 1865, c. 329), approved and sustained by this court (*State v. Verrill*, 54 Me. 408), with this difference, that in the statutory form the allegation does not appear, as it does in this indictment, that the prisoner ‘made an assault upon the deceased.’ The wisdom of the statute we have no doubt of. There was no part of criminal pleading so difficult as to safely and correctly describe in an indictment the means and manner by which a murder was committed. The declaration of Sir Matthew Hale seemed to be justified when (2 Pleas C. 193) he said, that ‘overgrown curiosity and nicety has become the disease of the law, and more offenders escape by the over-easy ear given to exceptions in indictments than by their own innocence.’ Under this general mode of alleging the crime, a court can order such specification of details and particulars as may be proper, and allow amendment or alteration thereof without imposing hazards upon the state or inflicting injury upon the prisoner.

“It is contended that, inasmuch as an assault is alleged in this indictment, not in accordance with the statutory form, but additional thereto, the particular means by which the assault was committed must be set out. It is claimed that

(158) *Throwing a bastard child in a privy.*(d)

That C. D., late of said B., single woman, on the day of
 now last past, being pregnant with a female child, afterwards, to wit, on the same day of in the year aforesaid, at B. aforesaid, the said female child, alone and in secret from her body did bring forth alive, which said female child, so born alive, was, by the laws of this commonwealth, a bastard; and that the said C. D., afterwards, to wit, on the same day of in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the said female bastard child, feloniously, wilfully, and of her malice aforethought, did make an assault; and that the said C. D., with both her hands, the said female bastard child, into a certain privy there situate, wherein was a great quantity of human excrements and other filth, then and there feloniously, wilfully, and of her malice aforethought, did cast and throw; by reason of which said casting and throwing of the said female bastard child into the said privy, by her the said C. D., in manner as

in *State v. Verrill* this point was not presented. If the indictment be good without such unnecessary allegation, it must be as good with it. The pleader adding words to what was complete before, only requires him to prove all that he has alleged. He is required to prove the murder to have been committed by force. But it does not follow because he has alleged more than is needful, that he is in a dilemma of not having alleged enough. He is not required to spread out his general averment of assault into particulars. *State v. Noble*, 15 Maine, 476; *State v. Smith*, 32 Maine, 369.

"We think the second count sufficient. We have seen no precedent of indictment that omits an allegation of the sex of the infant child, nor has any case come to our notice which decides that the allegation is necessary. Mr. Wharton in his *Criminal Precedents* remarks that the averment is necessary. But why necessary? The law requires a person to be described by his name. We take it that if an infant has a name, there would be no more occasion for averring the sex than in any other case. But it is laid down as a rule that, the name being unknown, it is sufficient to aver the name of the killed or injured person to be unknown. The law requires that an indictment shall be so certain as to the party against whom the offence was committed, as to enable the prisoner to understand who the party is, and upon what charge he is called upon to answer, as to prevent the prisoner from being put in jeopardy a second time for the same offence, and as will authorize the court to give the appropriate judgment on conviction. What would it practically add in these respects to the rights and safety of the accused in this case to have the sex alleged? In a criminal proceeding, the allegation of name is enough, though there may be more than one person of the same name in the same place. *State v. Grant*, 22 Maine, 171. It is enough to allege the name to be unknown, although the grand jury might have ascertained what the name was. *Com. v. Stoddard*, 9 Allen, 280."

(d) 3 Chit. C. L. 767. This form, and that which follows it, are given by Mr. Davis as conforming to the Massachusetts statute.

aforesaid, the said female bastard child, in the said privy, with the excrements and filth aforesaid, was then and there choked and suffocated; of which said choking and suffocation the said female bastard child then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. the said female bastard child, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(159) *Smothering a bastard child in a linen cloth.*(e)

That C. D., of said B., single woman, on the day of now last past, at B. aforesaid, in the county aforesaid, being pregnant with a certain female child, afterwards, to wit, on the same day of in the year aforesaid, at B. aforesaid, the said female child, alone and secretly from her body did bring forth alive, which said female child, so born alive, was, by the laws of this commonwealth, a bastard; and that the said C. D. afterwards, to wit, on the same day of in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the said female bastard child, feloniously, wilfully, and of her malice aforethought, did make an assault; and that the said C. D., with both her hands, the said female bastard child, in a certain linen cloth, feloniously, wilfully, and of her malice aforethought, did put, place, fold, and wrap up; by means of which said putting, placing, folding, and wrapping up of the said female bastard child, in the said linen cloth, by her the said C. D. as aforesaid, the said female bastard child was then and there choked, suffocated, and smothered; of which said choking, suffocation, and smothering, the said female bastard child then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. the said female bastard child, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder. (*Conclude as in book 1, chapter 3.*)

(e) See Davis's Prec. 178.

(160) *Murder in Pennsylvania, of a bastard child by strangling.*(f)

That U. S., of the county aforesaid, spinster, on, etc., being big with a female child, the same day and year, in the county aforesaid, by the providence of God did bring forth the said child alive of the body of her the said U., alone and in secret, which said female child, so being born alive, by the laws of this commonwealth was a bastard; and that the said U., not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, afterwards, to wit, on, etc., as soon as the said female child was born, with force and arms, at the county aforesaid, in and upon the said child, in the peace of God and this commonwealth, then and there being, feloniously, wilfully, and of her malice aforethought, did make an assault; and that she the said U., with both her hands about the neck of her the said child, then and there feloniously, wilfully, and of her malice aforethought, did choke and strangle; of which said choking and strangling, the said child then and there instantly died. And so the inquest, etc., do say, that the said U. S., her the said female bastard child, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder, contrary to the form of the act, etc., and against the peace and dignity, etc.

(161) *Murder. By starving apprentice.*(g)

Middlesex, to wit: The jurors for our lady the queen, upon their oaths present, that J. S., late of the parish of B. in the county of M., carpenter, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and of his malice aforethought, contriving and intending one J. N., then being an apprentice to him the said J. S., felo-

(f) This indictment was sustained after a conviction in Pennsylvania, in 1807. See for other forms for strangling, *supra*, 123, 128.

(g) Arch. C. P. 405. If the indictment be for refusing to supply the apprentice with necessaries, it must state that the apprentice was of tender years, unable to provide for himself. *R. v. Friend, R. & R.* 20; *R. v. Marriot*, 8 C. & P. 424. Where the indictment charges an imprisoning, that sufficiently shows the duty to supply food; but if it do not, then it must allege a duty in the defendant to supply the deceased with food. *R. v. Edwards*, 8 C. & P. 611. See as to evidence, Arch. C. P. 406 *et seq.* It is necessary, also, to prove that J. N. was the apprentice of J. S., or at least acted as such. Arch. C. P. 513.

niously to starve, kill, and murder, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, and on divers days and times between that day and the twenty-eighth day of the same month, in the same year, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said J. N., his apprentice as aforesaid, in the peace of God and of our said lady the queen, then and there being, feloniously, wilfully, and of his malice aforethought, did make divers assaults; and that the said J. S., on the said third day of August, in the year last aforesaid, at the parish aforesaid, in the county aforesaid, him the said J. N., in a certain room in the dwelling-house of him the said J. S. there situate, feloniously, wilfully, and of his malice aforethought, did secretly confine and imprison, and that the said J. S., from the said third day of August, in the year last aforesaid, until the twenty-eighth day of the same month, in the same year, at the parish aforesaid, in the county aforesaid, feloniously, wilfully, and of his malice aforethought, did neglect, omit, and refuse to give and administer, and to permit and suffer to be given and administered to him the said J. N., sufficient meat and drink necessary for the sustenance, support, and maintenance of the body of him the said J. N.; by means of which said confinement and imprisonment, and also of such neglecting and refusing to give and administer, and to permit and suffer to be given and administered to the said J. N., such meat and drink as were sufficient and necessary for the sustenance, support, and maintenance of the body of him the said J. N., he the said J. N., from the said third day of August, in the year last aforesaid, until the twenty-eighth day of the same month, in the same year, at the parish aforesaid, in the county aforesaid did languish, etc. etc.

(162) *Manlaughter by neglect. First count, that the deceased was the apprentice of prisoner, and died from neglect of prisoner to supply him with food, etc.(h)*

That on the third day of February, one thousand eight hundred and forty-two, at, etc., one R. K. (the deceased) was then

(h) R. v. Crumpton, 1 C. & M. 597. See for same when death did not ensue, *infra*, 914, etc.

and there an apprentice to one J. C. (the prisoner), and as such apprentice was then under the care and control of the said J. C.; and that it then and there became and was the duty of the said J. C., during the time aforesaid, to permit and suffer the said R. K. to take and have such proper exercise as was necessary and needful for the bodily health of the said R. K., so being such apprentice as aforesaid; and it then and there became and was the duty of the said J. C. to find, provide, and supply the said R. K., being such apprentice as aforesaid, with proper and necessary nourishment, medicine, medical care, and attention; and, etc. (*concluding by averring in the usual form that the deceased being weak in body, the prisoner struck and beat him, and forced, obliged, and compelled him to work for an unreasonable time, and would not allow him to take proper exercise and recreation, and neglected to supply him with proper nourishment and medicine, medical care and attention, by means whereof he died*), etc.

(163) *Second count—charging killing by overwork and beating.*

(The second count stated that the prisoner, in and upon the deceased, so being such apprentice as aforesaid, and under the care and control of him the said J. C. as aforesaid, and so being sick and weak in body as aforesaid, in the peace of God and our said lady the queen, feloniously did make an assault; and that the deceased being so weak in body as aforesaid, the prisoner forced him to work for certain unreasonable and improper times, and beat him, by means whereof he died.)

(163a) *Homicide of wife caused by neglect to provide her with necessities.*

The jurors for said state upon their oath present, that H. S., of B., in said county of Y., laborer, on, etc., at, etc., being then and there the husband of one L. A. S. his wife, and being then and there under the legal duty to provide for his said wife necessary clothing, shelter, and protection from the frost, cold, and inclemency of the weather, and then and there having the means to provide the same, and she, said L. A. S., being then and there weak, feeble, destitute, and infirm, and unable to go abroad, did then and there feloniously and wilfully neglect and

refuse to provide necessary clothing, shelter, and protection from the frost, cold, and inclemency of the weather for his said wife, whereby her health was greatly injured; and he the said H. S., afterward, to wit, on the next succeeding day and on every day between the said, etc., day of, etc., and the, etc., day of, etc., then next ensuing, did there feloniously and wilfully continue to neglect and refuse to provide her, the said L. A. S., with necessary clothing, shelter, and protection from the frost, cold, and inclemency of the weather; the said H. S. being there on all said days and times her husband as aforesaid, and having the means to provide the same as aforesaid, and, under the legal duty to provide the same as aforesaid, and she, the said L. A. S., having no means to provide the same as aforesaid, and being weak, feeble, destitute, infirm, and unable to go abroad as aforesaid; by reason whereof the said L. A. S. there on all the days and times before mentioned, until the, etc., day of, etc., in the year aforesaid, sickened and languished with a mortal sickness and feebleness of body so as aforesaid created and produced by the said H. S., until the, etc., day of, etc., now last past, on which said last mentioned day, at said, etc., she the said L. A. S., there of said mortal sickness and feebleness of body, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said H. S., her, the said L. A. S., in manner and by the means aforesaid, feloniously did kill and slay, against the peace, etc.(i)

(164) *Manslaughter. Against a woman for exposing her infant child so as to produce death.*(j)

(Third count.) That A. W., of, etc., on, etc., in the year aforesaid, with force and arms, at the parish aforesaid, in the county

(i) It was held in Maine that the above indictment "is sufficient without other or more precise or formal allegations of evil or wrongful intent on the part of the defendant or of his knowledge of the effect which his negligence was producing." *State v. Smith*, 65 Me. 257. For neglect to give food to child, see *infra*, 263a.

(j) *R. v. Walters*, 1 C. & M. 165. The principle determined in this case was, that if a person do any act towards another, who is helpless, which must necessarily lead to the death of that other, the crime amounts to murder; but if the circumstances are such that the person would not have been aware that the result would be death, that would reduce the crime to manslaughter, provided that the death was occasioned by an unlawful act, but not such an act as showed a malicious mind. It was said that if the defendant had left her child, a young infant, at a gentleman's door, a place where it was likely to be found and taken care of, and the child died, it would be manslaughter only; but if the child were left in a

aforesaid, in and upon a certain female child then and there born of the body of the said A. W., whose name is to the jurors aforesaid unknown, feloniously, wilfully, and of her malice aforethought, did make an assault. And the jurors aforesaid, upon their oath aforesaid, do further present, that it was the duty of the said A. W. then and there to provide proper and sufficient clothes, covering, and protection for the body of the said last mentioned female child, the said last mentioned female child being then and there unable to provide for and take care of herself; and that the said A. W., then and there, contrary to her duty in that behalf, feloniously, wilfully, and of her malice aforethought, with both her hands, did put and place the said last mentioned female child in a certain common and public highway and open place there, and then and there did feloniously, wilfully, and of her malice aforethought, desert and leave the said last mentioned female child there exposed to the inclemency of the weather, without sufficient clothes, covering, shelter and protection for the body of the said last mentioned female child. By means of which said several premises in this count mentioned, the said last mentioned female child became and was mortally sick, weak, and disordered in her body; of which said mortal sickness, weakness, and disorder aforesaid, the said last mentioned female child, on and from the said thirteenth day of April, in the year aforesaid, until the fourteenth day of the same month, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live, and then and there, to wit, on the said fourteenth day of April, in the year aforesaid, at the parish aforesaid, in the county aforesaid, did die. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. W., the said last mentioned female child, in manner and form last aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder, against the peace of our lady the queen, her crown and dignity.

Fourth count.

And the jurors aforesaid, upon their oath aforesaid, do fur-

remote place, where it was not likely to be found, *e. g.*, on a barren heath, and the death of the child ensued, it would be murder. The defendant was convicted of manslaughter. See Wh. Cr. L. 8th ed. §§ 156, 358, 359, 447.

ther present, that the said A. W. afterwards, to wit, on the day and year first aforesaid, at the parish aforesaid, in the county aforesaid, being big with a certain female child, the same female child alone and secretly from her body did then and there bring forth alive. And the jurors aforesaid, upon their oath aforesaid, do further present, that it then and there became and was the duty of the said A. W., as the mother of the same child (to fasten, tie, and secure the navel-string of the body of the same child, and to provide and procure such clothing, covering, and shelter for the body of the same child as were then and there necessary and sufficient to protect and defend the same child from the cold and inclemency of the weather, and also to procure for and give and administer to the same child such milk and food as was then and there necessary and sufficient for the support and maintenance of said child). And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. W., not regarding her duty in that behalf, but being moved and seduced by the instigations of the devil, on the day and year first aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the same child not named, in the peace of God and our said lady the queen, then and there being, feloniously, wilfully, and of her malice aforethought, did make an assault; and that the said A. W. the same child into both her hands feloniously, wilfully, and of her malice aforethought, did then and there take, and that the said A. W. the same child feloniously, wilfully, and of her malice aforethought, with both her hands, did then and there put and place in a certain road there situate, and the same child in the said road, then and there, feloniously, wilfully, and of her malice aforethought, did expose, leave, and abandon, naked and without any clothing, covering, or shelter whatever to protect the body of the same child from the cold and inclemency of the weather.† And that the said A. W. did then and there feloniously, wilfully, and of her malice aforethought, wholly neglect, omit, and refuse to tie, fasten, or in any way secure the navel-string of the body of the same child, and that the said A. W. did then and there feloniously, wilfully, and of her malice aforethought, wholly neglect, omit, and refuse to provide and procure any clothing, covering, or shelter whatsoever for the same child;

and that the said A. W. did then and there feloniously, wilfully, and of her malice aforethought, wholly neglect, omit, and refuse to procure for or to give or administer to the same child milk or other food whatsoever, by means of which said last mentioned exposure, leaving, and abandonment of the same child, and also by the omitting and refusing to tie, fasten, and secure the navel-string of the body of the same child as aforesaid, and to provide and procure clothing, covering, and shelter for the body of the same child as last aforesaid, and to procure for and give and administer to the same child milk and food as last aforesaid,† the same child, from the time of its birth aforesaid, on the day and year first aforesaid, until the fourteenth day of the same month, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live; on which said fourteenth day of April, in the year aforesaid, the same child, at the parish aforesaid, in the county aforesaid, of such leaving, abandonment, and exposure, and of such wilful omission, neglect, and refusal as in this count mentioned, did then and there die. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said A. W. the same child in manner and form last aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder, against the peace of our lady the queen, her crown and dignity.

Fifth count.

(*Exactly similar to the fourth, but instead of the parts between (), inserting the following*): To protect and defend the same child from the cold and inclemency of the weather, and to provide and procure such clothing, covering, and shelter for the body of the said child as was then and there necessary and sufficient to protect and defend the same child from the cold and inclemency of the weather.* (*And instead of the allegation between ††, inserting the following*): And that the said A. W. did then and there feloniously, wilfully, and of her malice aforethought, wholly neglect, omit, and refuse to protect and defend the same child from the cold and inclemency of the weather, or to provide or procure any clothing, covering, or shelter whatsoever for the same child,** by means of which said last mentioned exposure, leaving, and abandonment of the same child, and also

neglecting, omitting, and refusing to protect and defend the same child from the cold and inclemency of the weather, and to provide and procure clothing and shelter for the body of the same child, as in this count mentioned.***

Sixth count.

*(Exactly similar to the fifth count, except that in stating the duty of the prisoner, the following words were added at the *)*: And also to procure for, and give and administer to the same child, such milk and food as was then and there necessary and sufficient for the support and maintenance of the same child. *(And in stating the cause of the death, the following allegation was inserted at the **)*: And that the said A. W. did then and there feloniously, wilfully, and of her malice aforethought, wholly neglect, omit, and refuse to procure for, give, or administer to the same child any milk or other food whatsoever. *(And at the *** the following was inserted)*: And to procure for, and to give and administer to the same child, milk and food as last aforesaid.

(165) *Manslaughter—by forcing an aged woman out of her house in the night, ducking, tarring, feathering, and whipping her.*

That A. B., C. D., E. F., G. H., I. J., and K. L., all late of the county aforesaid, etc., at the county of Montgomery aforesaid, with force and arms, in and upon the body of one M. N., then and there being, unlawfully did make an assault, and that they, the said A. B., C. D., E. F., G. H., I. J., and K. L., did then and there unlawfully and forcibly take the said M. N. from the dwelling-house wherein she was then and there residing, out into the open air, and that they did then and there unlawfully carry and force along the said M. N. a great distance, to wit, the distance of two hundred yards, and that they did then and there unlawfully throw, cast, force, push, and dip the said M. N. into the Great Miami River, then and there flowing, wherein there was a great quantity of water, whereby (this being in the night season of the said day, and the said M. N. being then and there an old woman, and just taken from her dwelling-house as aforesaid) the said M. N. was then and there thoroughly chilled, and that they did then and there unlawfully cast, throw, and knock the said M. N. down unto and upon the ground, with

great force and violence, and that they did then and there unlawfully drag the said M. N. along and upon the ground a great distance, to wit, the distance of one hundred yards, and that they did then and there unlawfully force and spread in and upon the body of the said M. N. a great quantity of tar, and a great quantity of feathers, and that they did then and there unlawfully strike, beat, whip, and kick the said M. N. with their hands and feet, and with certain switches, which they then and there in their hands had and held, in and upon the head, neck, breast, back, belly, sides, legs, and other parts of the body of the said M. N., then and there giving to the said M. N., by the forcibly taking the said M. N. from the said dwelling-house as aforesaid, and by the casting and throwing and knocking the said M. N. down unto and upon the ground as aforesaid, and by the dragging her along and upon the ground as aforesaid, and by the pouring and spreading the said tar and the said feathers in and upon the body of the said M. N. as aforesaid, several mortal injuries in and upon the head, neck, breast, back, belly, sides, legs, and other parts of the body of the said M. N., of which said mortal injuries the said M. N., from the said to the in the county aforesaid, did languish, and languishng did live; on which said at the county aforesaid, the said M. N., of the mortal injuries aforesaid, died: And so the jurors aforesaid, on their oaths aforesaid, do say, that the said A. B., C. D., E. F., G. H., I. J., and K. L., in the manner and by the means aforesaid, her the said M. N. unlawfully did kill and slay, contrary, etc., and against, etc.(k)

(166) *Manslaughter—against the keeper of an asylum for pauper children, for not supplying one of them with proper food and lodging, whereby the child died.*(l)

The jurors, etc., upon their oath present, that heretofore and during all the days and times hereinafter in this count mentioned, James Andrews was a poor, indigent, and destitute infant child of very tender age, to wit, of the age of six years,

(k) Warren, C. L. 11.

(l) 3 Cox, C. C. Appendix, p. lxxv. For starving an apprentice, see *supra*, 161. Wh. Cr. L. 8th ed. §§ 1563 *et seq.*

and unable to provide himself with necessary food, shelter, or clothing, or any of the necessities of life; and that heretofore, to wit, on the twenty-eighth day of October, in the year of our Lord, etc., Peter Bartholomew Drouet, late of the parish of Tooting, in the county of Surrey, and within the jurisdiction of the said central criminal court, gentleman, being the keeper of a certain asylum for the reception of poor, destitute, and indigent children, at the parish aforesaid, and within the jurisdiction of the said court, to wit, called and known by the name of Surrey Hall, at the request and with the approbation of the guardians of the poor of the Holborn Union, in the county of Middlesex, who then had the charge and custody of the said J. A., and then under the laws of this realm relating to the relief of the poor, were charged with the relief and support of the said J. A., within their said union, at his request received, and had the said J. A. in the charge and custody of the said P. B. D., by him to be provided with good and proper abode, shelter, and lodging, and all the necessary sleeping accommodation, meat, drink, food, and clothing, for and on behalf of the said guardians, for reward to the said P. B. D. in that behalf. And the jurors further present, that thenceforth and on and from the said twenty-eighth day of October, in the year of our Lord and upon and during all the days and times between that day and the fifth day of January, in the year of our Lord the said P. B. D. kept and detained the said J. A., and the said J. A. continued and remained, and was under the charge, care, dominion, government, custody, and control of the said P. B. D. in the said asylum, to wit, at the parish aforesaid, and within the jurisdiction of the said central criminal court, and the said J. A. was, during all the several days and times aforesaid, wholly subject to and dependent upon the said P. B. D. for such abode, shelter, lodging, sleeping accommodation, meat, drink, food, and clothing as aforesaid, and was unable to obtain the same, or any of them, from any other source, or from any other person or persons whomsoever. And the jurors aforesaid, upon their oath aforesaid, do further present, that thereupon, to wit, upon the said twenty-eighth day of October, in the year of our Lord and thenceforth during all the days and times in this count aforesaid, it became and was the duty of the said P. B. D. to

furnish, provide, and supply the said J. A. with good and wholesome food, meat, and drink, in such sufficient quantities as should be necessary for the healthy support, nourishment, and sustenance of the body of the said J. A.; and also to furnish, provide, and supply the said J. A. with such proper, suitable, and wholesome lodging, shelter, and abode, as should, upon and during all the several days and times aforesaid, be needful for the said J. A., and be necessary to preserve him in a good and sound state of bodily health, and free from sickness, weakness, and disorder; and also during all the days and times aforesaid, to furnish, provide, and supply the said J. A. with such healthy, wholesome, and proper bedding and sleeping accommodation as should be necessary to enable the said J. A. to enjoy a due and proper quantity of wholesome, healthy, and refreshing rest and sleep; and also to furnish, provide, and supply the said J. A. with a sufficient quantity of warm and wholesome clothing, for the protection of the body of the said J. A. from the cold, damp, and inclemency of the weather; all of which said several premises the said P. B. D., upon and during all the several days and times in this count mentioned, well knew. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said P. B. D., on the several days aforesaid, with force and arms, at the parish of Tooting aforesaid, and within the jurisdiction of the said central criminal court, in and upon the said J. A., feloniously did make divers assaults; and that the said P. B. D., not regarding his duty as aforesaid, upon all and every the days aforesaid, and during all the said times, whilst the said J. A. remained and continued under the care, charge, dominion, government, custody, and control of the said P. B. D. in the said asylum, at the parish of Tooting aforesaid, and within the jurisdiction of the said central criminal court, feloniously did omit, neglect, and refuse to furnish, provide, or supply the said J. A. with good and wholesome food, meat, and drink, in such sufficient quantities as were upon and during all and every of those days respectively, and during all the time aforesaid, necessary for the healthy support, nourishment, and sustenance of the body of the said J. A., according to the duty of the said P. B. D. in that behalf, and on the contrary thereof, upon and during all and every the days aforesaid, and during all the time

aforesaid, at the parish of Tooting aforesaid, and within the jurisdiction of the said central criminal court, feloniously, and without any lawful excuse whatsoever, did furnish, provide, and supply the said J. A. with food, meat, and drink in very insufficient and inadequate quantities, and in no sufficient and adequate quantity or quantities whatsoever, for such support, nourishment, and sustenance of the body of the said J. A. as aforesaid; and that the said P. B. D., not regarding his duty as aforesaid, upon and during all and every of the days aforesaid, and during all the said time whilst the said J. A. remained and continued under such charge, care, dominion, government, custody, and control as aforesaid, in the said asylum, at the parish of Tooting aforesaid, and within the jurisdiction of the said central criminal court, feloniously did omit, neglect, and refuse to furnish, provide, or supply the said J. A. with such proper, suitable, and wholesome lodging, shelter, and abode as was, upon and during all the several days aforesaid, and during all the time aforesaid, needful for the said J. A., and necessary to preserve him in a good and sound state of bodily health, and free from sickness, weakness, and disorder, and as, according to the said duty of the said P. B. D., he ought to have done, and on the contrary thereof, the said P. B. D., at the parish of Tooting aforesaid, and within the jurisdiction of the said central criminal court, upon and during all the several days aforesaid, and during all the time aforesaid, knowingly, feloniously, and contrary to his duty in that behalf, did keep the said J. A., and force, compel, and oblige the said J. A. to be and remain in divers ill-ventilated and unwholesome rooms, inhabited by and overcrowded with an excessive and injurious number of other persons in the said asylum, and feloniously did expose the said J. A., and force and compel the said J. A. to be and remain exposed for divers long spaces of time, on each of the days aforesaid, to divers fetid, injurious, noxious, unwholesome, and pestilential exhalations and vapors in, near to, around, and about the said asylum then arising and existing; and that the said P. B. D., not regarding his duty as aforesaid, upon and during all and every the days aforesaid, and during all the said time whilst the said J. A. remained and continued under such charge, care, dominion, government, custody, and control as aforesaid,

in the said asylum, at the parish of Tooting aforesaid, and within the jurisdiction of the said central criminal court, feloniously did omit, neglect, and refuse to furnish, provide, and supply the said J. A. with such healthy, wholesome, and proper bedding and sleeping accommodation as was necessary to enable the said J. A., on all and every the said several days aforesaid, to enjoy a due quantity of wholesome, healthy, and refreshing rest and sleep, and as, according to the duty of the said P. B. D., he ought to have done, and on the contrary thereof, upon divers nights during all the time aforesaid, at the parish of Tooting aforesaid, and within the jurisdiction of the said central criminal court, feloniously and knowingly did force, oblige, and compel the said J. A. to lie and be in a certain ill-ventilated and unwholesome room, then overcrowded with an excessive and injurious number of other persons in the said asylum, and to be and remain, for divers long spaces of time on each of the nights aforesaid, in divers fetid, injurious, noxious, unwholesome, and pestilential vapors and exhalations in the said room arising and existing, and also to lie and be in a certain small bed in the said room, together with two other persons, to wit, Joseph Andrews and William Derbyshire, whereby the said bed became and was, on all and every of the said nights, rendered unwholesome and injurious to the said J. A., and totally unfit for and incapable of affording to the said J. A. such wholesome, healthy, and refreshing sleep as aforesaid; and that the said P. B. D., not regarding his duty as aforesaid, upon and during all and every the days aforesaid, and during all the said time whilst the said J. A. remained and continued under such charge, care, dominion, government, custody, and control as aforesaid, in the said asylum, at the parish of Tooting aforesaid, and within the jurisdiction of the said court, feloniously did omit, neglect, and refuse to furnish, provide, or supply the said J. A. with any sufficient quantity of warm and wholesome clothing, or with a sufficient quantity of any clothing whatever for the protection of the body of the said J. A. from the cold, damp, and inclemency of the weather, and as, according to the duty of the said P. B. D., he ought to have done, and on the contrary thereof, during divers cold, wet, and inclement days during the time aforesaid, at the parish aforesaid, and within

the jurisdiction of the said central criminal court, feloniously, and contrary to his duty in that behalf, left the said J. A. exposed, and then and there suffered and permitted the said J. A. to remain exposed, for divers long spaces of time, to the cold, damp, and inclemency of the weather, etc., without any sufficient or adequate quantity of clothing or covering for his body, and with a totally inadequate and insufficient quantity of clothing and covering for the body of the said J. A., to protect him from the severity and inclemency of the weather. By reason and means of which said several felonious acts, defaults, and omissions of the said P. B. D. hereinbefore alleged, the said J. A. afterwards, on the said fifth day of January, in the year of our Lord at the parish of Tooting aforesaid, and within the jurisdiction of the said court, became and was, and the said P. B. D. did thereby then and there feloniously cause and occasion the said J. A. to become and be mortally sick, weak, diseased, disordered, and distempered in his body. Of which said mortal sickness, weakness, disease, disorder, and distemper, the said J. A., on and from the said last mentioned day in the year of our Lord until the sixth day of January in the same year, as well at the parish aforesaid and within the jurisdiction of the said court, as at the parish of Saint Pancras, in the county of Middlesex, and within the jurisdiction of the said court, did languish, and languishing did live, and then on the said last mentioned day, at the parish last aforesaid, in the county last aforesaid, and within the jurisdiction of the said court, of the mortal sickness, weakness, disease, disorder, and distemper aforesaid, did die. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said P. B. D., the said J. A., in manner and form aforesaid, feloniously did kill and slay, against the peace, etc.

Second count.

(The same as the first, except that it charged acts of omission only.)

Third count.

(The same as the first, charging acts of commission only.)

Fourth count.

The jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and during all the days and times here-

inafter in this count mentioned, J. A., hereinafter in this count mentioned, was a poor, indigent, and destitute infant child of a tender age, to wit, of the age of six years, and unable to provide himself with necessary food, shelter, or clothing, or any of the necessaries of life, and that heretofore, to wit, on the said twenty-eighth day of October, in the year of our Lord the said P. B. D., being the keeper of the said asylum, in the first count of this indictment mentioned, to wit, at the parish of Tooting aforesaid, and within the jurisdiction of the said court, voluntarily received the said J. A. into the charge and custody of the said P. B. D., and the said P. B. D. thenceforth and on and from the said twenty-eighth day of October, and upon and during all the days and times between that day and the fifth day of January, in the year of our Lord kept and detained the said J. A., and the said J. A. continued, remained, and was under the care, charge, dominion, government, custody, and control of the said P. B. D., in the said asylum, to wit, at the parish of Tooting aforesaid, and within the jurisdiction of the said central criminal court, and the said J. A. was, during all the several days and times in this count aforesaid, wholly subject to and dependent upon the said P. B. D. for abode, shelter, lodging, sleeping accommodation, meat, drink, food, and clothing, and was unable to obtain the same, or any of them, from any other source or from any other person or persons whomsoever. And the jurors aforesaid do further present, that the said P. B. D., on the several days in this count aforesaid, at the parish of Tooting aforesaid, and within the jurisdiction of the said central criminal court, in and upon the said J. A., feloniously did make divers assaults, and that the said P. B. D., upon and during all and every the days in this count aforesaid, and during all the said time whilst the said J. A. remained and continued under the care, charge, dominion, government, custody, and control of the said P. B. D., in the said asylum, as in this count mentioned, at the parish of Tooting aforesaid, and within the jurisdiction of the said central criminal court, feloniously did omit, neglect, and refuse to furnish, provide, or supply the said J. A. with meat and drink in sufficient quantities for the support, nourishment, and sustenance of the body of the said J. A., according to the duty of

the said P. B. D., in that behalf; but on the contrary thereof, upon and during all and every the days in this count aforesaid, and during all the time in this count aforesaid, at the parish of Tooting aforesaid, and within the jurisdiction of the said court, feloniously and without any lawful excuse whatsoever, did furnish, provide, and supply the said J. A. with food, meat, and drink in very insufficient and inadequate quantities, and in no sufficient and adequate quantity whatsoever for such support, nourishment, and sustenance of the body of the said J. A., as in this count aforesaid, and that the said P. B. D., upon and during all and every the days in this count aforesaid, and during all the said time whilst the said J. A. remained and continued under such charge, care, dominion, government, custody, and control, as in this count aforesaid, in the said asylum, at the parish of Tooting aforesaid, and within the jurisdiction of the said central criminal court, feloniously did omit, neglect, and refuse to furnish, provide, or supply the said J. A. with such proper and suitable lodging, shelter, and abode, as was, upon all and every the days in this count aforesaid, and during all the said last mentioned time, needful for the said J. A. and necessary to preserve him in a good state of bodily health, according to his duty in that behalf, but on the contrary thereof, the said P. B. D., upon all the several days and times in this count aforesaid, at the parish of Tooting aforesaid, and within the jurisdiction of the said central criminal court, knowingly and feloniously did force, compel, and oblige the said J. A. to be and remain, for divers long spaces of time, in divers ill-ventilated and unwholesome rooms and apartments, then overcrowded with an excessive and injurious number of other persons in the said asylum, and feloniously did expose the said J. A., and force, oblige, and compel the said J. A. to be and remain exposed for divers long spaces of time to divers fetid, injurious, noxious, unwholesome, and pestilential vapors and exhalations in, near to, around, and about the said asylum, then arising and existing; and that the said P. B. D., upon and during all and every the days in this count aforesaid, during all the time whilst the said J. A. remained and continued under such charge, care, dominion, government, custody, and control of the said P. B. D., as in this count aforesaid, at the parish of

Tooting aforesaid, and within the jurisdiction of the said central criminal court, feloniously did omit, neglect, and refuse to furnish, provide, or supply the said J. A. with such bedding and sleeping accommodation as was necessary to enable the said J. A., on all and every the several days in this count aforesaid, to enjoy a due quantity of wholesome, healthy, and refreshing rest and sleep, according to the duty of the said P. B. D., in that behalf; but on the contrary thereof, upon divers nights during the time in this count aforesaid, at the parish of Tooting aforesaid, and within the jurisdiction of the said court, feloniously and knowingly did force, oblige, and compel the said J. A. to lie and be in a certain ill-ventilated and unwholesome room, then overcrowded with an excessive and injurious number of other persons, and to be and remain for divers long spaces of time in divers fetid, injurious, noxious, unwholesome, and pestilential vapors and exhalations in the said room then arising and existing, and also to lie and be in a certain small bed in the said room, together with two other persons, to wit, J. A. and W. D., whereby the said bed became and was on all and every of the said nights totally unfit for and incapable of affording the said J. A. any wholesome, healthy, or refreshing sleep whatsoever, and that the said P. B. D., not regarding his duty in that behalf, upon all and every the days in this count aforesaid, and during all the said time whilst the said J. A. remained and continued under such charge, care, dominion, government, custody, and control, as in this count aforesaid, at the parish of Tooting aforesaid, and within the jurisdiction of the said central criminal court, feloniously did omit, neglect, and refuse to furnish, provide, or supply the said J. A. with a sufficient quantity of any clothing or covering whatsoever, for the protection of the body of the said J. A. from the cold, damp, and inclemency of the weather, according to the duty of the said P. B. D. in that behalf, but on the contrary thereof, during divers of the said days, in this count before mentioned, which were damp, cold, and inclement, at the parish of Tooting aforesaid, and within the jurisdiction of the said court, feloniously and contrary to his duty in that behalf, left the said J. A. exposed, and then and there suffered and permitted the said J. A. to be and remain exposed for divers long spaces of

time without any sufficient or adequate quantity of clothing or covering for his body, but with a totally inadequate and insufficient quantity of clothing and covering for the body of the said J. A., to protect him from the severity and inclemency of the weather, by reason and means of which said several felonious acts, defaults, and omissions of the said P. B. D. in this count before alleged, the said J. A. afterwards, to wit, on the fifth day of January, in the year of our Lord at the parish of Tooting aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said court, became and was, and the said P. B. D. did thereby then and there feloniously cause and occasion the said J. A. to become and be mortally sick, weak, diseased, disordered, and distempered in his body. Of which said last mentioned mortal sickness, weakness, disease, disorder, and distemper, the said J. A., on and from the said last mentioned day until the sixth day of January, in the year of our Lord as well at the parish of Tooting aforesaid, and within the jurisdiction of the said court, as at the parish of Saint Pancras, in the county of Middlesex and within the jurisdiction of the said central criminal court, did languish, and languishing did live, and then on the said last mentioned day, in the year of our Lord aforesaid, at the parish last aforesaid, in the county of Middlesex aforesaid, and within the jurisdiction of the said central criminal court, of the said last mentioned mortal sickness, weakness, disease, disorder, and distemper, did die; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said P. B. D., the said J. A., in manner and form in this count mentioned, feloniously did kill and slay, against the peace, etc.

Fifth count.

(Same as the fourth, except that it charged acts of omission only.)

Sixth count.

(Same as the fourth, but charging acts of commission only.)

Seventh count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, on all the days and times herein-

after in this count mentioned, J. A., hereinafter in this count mentioned, was a poor, indigent, and destitute infant child, of very tender age, to wit, of the age of six years, and was totally unable to provide for or take care of himself, and during all the days and times in this count mentioned was in a sick, feeble, and disordered state of health, and required, for the purpose of enabling him to recover bodily health and strength, to be kept in a pure and healthy atmosphere, and some airy and well ventilated place or places. And the jurors aforesaid, upon their oath aforesaid, do further present, that on and from the second day of January, in the year of our Lord until the fifth day of the same month, the said J. A. was in and under the care, charge, dominion, government, control, and keeping of the said P. B. D., in the said asylum in the first count of this indictment mentioned, for reward to the said P. B. D. in that behalf, and that during all the time the said J. A. remained under such charge, care, dominion, government, custody, and control, as in this count aforesaid, it was the duty of the said P. B. D. to furnish and provide the said J. A. with such healthy and wholesome shelter, lodging, and sleeping accommodation as should be necessary to enable the said J. A. to recover his bodily health and strength. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said P. B. D., upon the said second day of January, in the year of our Lord at the parish of Tooting aforesaid, and within the jurisdiction of the said court, in and upon the said J. A. feloniously did make an assault; and the said P. B. D., then and there, and upon all the days in this count before mentioned, and during all the time whilst the said J. A. was so under the care, charge, dominion, government, control, and keeping of the said P. B. D., as in this count aforesaid, at the parish of Tooting aforesaid, and within the jurisdiction of the said court, feloniously, and contrary to his duty in that behalf, did keep, confine, and detain the said J. A. in divers close, confined, and ill-ventilated rooms in the said asylum, and which, during all the time last aforesaid, were rendered and were impure, unhealthy, unwholesome, and unfit for the said J. A. to inhabit, by reason of their being overcrowded with a large, excessive, and injurious number of other persons; and also during divers nights, during the time last

aforesaid, feloniously did force, compel, and oblige the said J. A. to lie, remain, and be in a certain close and confined and ill-ventilated bedroom, which also was on all the said nights impure, unwholesome, and unhealthy, by reason of divers impure, injurious, noxious, and pestilential vapors and exhalations in the said last mentioned bedroom, then arising, existing, and being; by reason and by means of which said several felonious acts and defaults of the said P. B. D., in this count mentioned, the said J. A. afterwards, to wit, on the fifth day of January, in the year of our Lord at the parish of Tooting aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said central criminal court, became and was mortally sick, weak, diseased, disordered, and distempered in his body, of which said last mentioned mortal sickness, weakness, disease, disorder, and distemper the said J. A., on and from the day last aforesaid, until the sixth day of January, in the same year, as well at the parish of Tooting aforesaid, and within the jurisdiction of the said central criminal court, as at the parish of Saint Pancras, in the county of Middlesex aforesaid, and within the jurisdiction of the said central criminal court, did languish, and languishing did live, and then on the said sixth day of January, in the year of our Lord at the parish last aforesaid, and within the jurisdiction of the said court, of the said last mentioned mortal sickness, weakness, disease, disorder, and distemper did die. And so the jurors aforesaid, upon their oath aforesaid, say, that the said P. B. D. the said J. A., in manner and form in this count aforesaid, feloniously did kill and slay, against the peace, etc.

Eighth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and at the time of committing the offence by the said P. B. D., and during all the times hereinafter mentioned, J. A., hereinafter in this count mentioned, was a poor, indigent, and destitute child of a tender age, to wit, of the age of six years, and totally unable to support, provide for, and take care of himself; and the said P. B. D., at his request, had the care, charge, possession, and custody of the said J. A., and had undertaken the support and maintenance of the

said J. A., and the finding and providing the said J. A. with reasonably sufficient and proper victuals, food, drink, board, clothing, and lodging, for reward to the said P. B. D. in that behalf, to wit, within the jurisdiction of the said central criminal court. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said P. B. D., on the said twenty-eighth day of October, in the year of our Lord and on divers days and times aforesaid, to wit, and before the death of the said J. A., as hereinafter mentioned, at the parish of Tooting aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said court, in and upon the said J. A. feloniously did make divers assaults, and knowingly, wilfully, and feloniously did put, place, keep, and lodge the said J. A., for divers long spaces of time, to wit, for and during the whole of those days and times, in divers rooms and apartments, then and during all that time greatly and excessively overcrowded, overcharged, and filled to excess with divers and very many other infants and persons, and then also being in an ill-ventilated, impure, foul, unwholesome, unhealthy state, and in an unfit and improper state for the said J. A. to be put, placed, kept, and lodged in, and unfit for the habitation of man; and also on the said days and times, at the place aforesaid, within the jurisdiction of the said court, wilfully and feloniously did neglect, omit, and refuse to give and administer to, or find and provide the said J. A. with, and to suffer and permit to be given and administered to, or found and provided the said J. A. with reasonably sufficient and proper victuals, food, drink, and clothing necessary for the sustenance, support, and maintenance of the body of the said J. A., by means of which said placing, keeping, putting, and lodging the said J. A. in the said rooms and apartments, and also by means of which said neglecting, omitting, and refusing to give and administer to, or find and provide the said J. A. with such reasonably sufficient and proper victuals, food, drink, and clothing as were necessary for the sustenance, support, and maintenance of the body of the said J. A., the said J. A. afterwards, to wit, on the fifth day of January, in the year of our Lord at the place aforesaid, in the county aforesaid, and within the jurisdiction of the said court, became and was mortally sick and ill, weak, diseased,

disordered, and distempered in his body, and of which said last named mortal sickness, illness, weakness, disease, disorder, and distemper the said J. A., on and from the day and year last aforesaid, until, to wit, the sixth day of January, in the year of our Lord as well at the parish of Tooting aforesaid, and within the jurisdiction of the said court, as at the parish of Saint Pancras, in the county of Middlesex, and within the jurisdiction of the said court, did languish, and languishing did live, and then, to wit, on the day and year last aforesaid, at the parish last aforesaid, in the county last aforesaid, and within the jurisdiction of the said court, of the said last named mortal sickness, illness, weakness, disease, disorder, and distemper, did die. And so the jurors aforesaid, on their oath aforesaid, do say, that the said P. B. D. the said J. A., in manner and form in this count aforesaid, feloniously did kill and slay, against the peace, etc.

Ninth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that before and at the time of the committing of the offence by the said P. B. D., and during all the times hereinafter mentioned, J. A., hereinafter in this count mentioned, was a poor, indigent, and destitute child of a tender age, to wit, of the age of six years, and wholly unable to support, provide for, and take care of himself; and the said P. B. D., at his request, had the care, charge, possession, and custody of the said J. A., and had undertaken the support and maintenance of the said J. A., and the finding and providing the said J. A. with reasonably sufficient and proper board and lodging, for reward to the said P. B. D. in that behalf, to wit, within the jurisdiction of the said central criminal court. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said P. B. D., on the said twenty-eighth day of October, in the year of our Lord and on divers days and times afterwards, and before the death of the said J. A., as hereinafter mentioned, at the parish of Tooting aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said court, in and upon the said J. A. feloniously did make divers assaults, and knowingly, wilfully, and feloniously did put, place, keep, and

lodge the said J. A., for divers long spaces of time, to wit, for and during the whole of those days and times, in divers rooms and apartments, then and during all that time greatly and excessively overcrowded, overcharged, and filled to excess with divers and very many other infants and persons, and then also being in an ill-ventilated, impure, foul, unwholesome, and unhealthy state, and in an unfit and improper state for the said J. A. to be put, placed, kept, and lodged in; by means of which said putting, placing, keeping, and lodging the said J. A. in the said rooms and apartments, the said J. A. afterwards, to wit, on the fifth day of January, in the year of our Lord at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, became and was mortally sick and ill, weak, diseased, disordered, and distempered in his body, and of which said last mentioned sickness, illness, weakness, disease, disorder, and distemper the said J. A., on and from the day and year last aforesaid, until, to wit, on the sixth day of January, in the year of our Lord as well at the parish of Tooting aforesaid, and within the jurisdiction of the said court, as at the parish of Saint Pancras, in the county of Middlesex, and within the jurisdiction of the said court, did languish, and languishing did live, and then, to wit, on the day and year last aforesaid, at the parish last aforesaid, in the county last aforesaid, and within the jurisdiction of the said court, of the said last mentioned mortal sickness, illness, weakness, disease, disorder, and distemper, did die. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said P. B. D. the said J. A., in manner and form in this count aforesaid, feloniously did kill and slay, against the peace, etc.

(167) *Manslaughter by striking with a stone.*(m)

That T., on, etc., at, etc. (*commencing as usual*), at G., in the county of M. aforesaid, in and upon one J. L., in the peace of said commonwealth, then and there being, feloniously and wilfully did make an assault, and that he the said T. a certain stone, which he the said T. in his right hand then and there had and held, in and upon the left side of the head of him the said J. L.,

(m) Under this form it was held, that it was sufficiently averred that T. gave L. a mortal wound on the 25th of September, at G. *Turns v. Com.*, 6 Met. 225.

then and there feloniously and wilfully did cast and throw, and that the said T., with the stone aforesaid, so as aforesaid cast and thrown, the aforesaid J. L., in and upon the left side of the head of him the said J. L., then and there feloniously and wilfully did strike, penetrate, and wound, giving to the said J. L., by the casting and throwing of the stone aforesaid, in and upon the left side of the head of him the said J. L., one mortal wound, of the length of one inch, and of the breadth of half an inch, of which said mortal wound he the said J. L., from the said twenty-fifth day of September, in the year aforesaid, to the twenty-sixth day of the same September, at G. aforesaid, in the county aforesaid, did languish, and languishing did live; on which twenty-sixth day of the same September, at G. aforesaid, the said J. L., of the mortal wound aforesaid, died; and so the said jurors aforesaid, upon their oath aforesaid, do say, that the said T. him the said J. L., in manner and form aforesaid, feloniously and wilfully did kill and slay, against, etc. (*Conclude as in book 1, chapter 3.*)

(168) *Manslaughter. By giving to the deceased large quantities of spirituous liquors of which he died.*(n)

That J. R. P., J. P., and A. K., etc., on the fifth of November, at, etc., did give, administer, and deliver to one M. A. divers large and excessive quantities of spirituous liquors mixed with water, and also divers large and excessive quantities of wine and porter, to wit, one pint of brandy mixed with water, one pint of rum mixed with water, one pint of gin mixed with water, two quarts of wine called port wine, and one quart of porter, and then and there, unlawfully and feloniously, did induce, procure, and persuade the said M. A. to take, drink, and swallow down into his body the said quantities of spirituous liquors mixed with water, and of wine and porter, the said quantities, etc., being then and there, when taken, drunk, and swallowed by the said M. A., likely to cause and procure his death, and which they the said J. R. P., J. P., and A. K., then and there well knew; and that the said M. A. did then and there, by means

(n) *R. v. Packard*, 1 C. & M. 133. The defendants were found guilty before Mr. Baron Parke.

of the said inducement, procurement, and persuasion, etc., take drink, and swallow down into his body the said large quantities, etc., so given, etc., unto him as aforesaid, by means whereof the said M. A., then and there, became and was greatly drunk and intoxicated, sick, and greatly distempered in his body; and while he the said M. A. was so drunk, etc., as aforesaid, they the said J. R. P., J. P., and A. K. did then and there, to wit, on, etc., at, etc., make an assault on him the said M. A., and then and there unlawfully and feloniously forced and compelled him to go, and put, placed, and confined him in a certain carriage, to wit, a cabriolet, and then and there drove and carried him about therein for a long time, to wit, for two hours then next following, and therein and thereby, then and there, greatly shook, threw, pulled, and knocked about the said M. A., by means whereof the said M. A., then and there, also became mortally sick and greatly distempered in his body; of which said large and excessive quantities of the said spirituous liquors, etc., so by him the said M. A. taken, etc., as aforesaid, and of the said drunkenness, etc., occasioned thereby, and of the said shaking, etc., and of the said sickness and distemper occasioned thereby, he the said M. A., then and there instantly died. (*Conclude with an allegation in the usual form, viz.*): that the said J. R. P., J. P., and A. K., the said M. A., in manner and form aforesaid, unlawfully and feloniously did kill and slay, etc.

(169) *Against driver of a cart for driving over deceased.*

That A. B., of, etc., on with force and arms, at in the county aforesaid, in the public highway there, in and upon one C. D., in the peace of the said commonwealth, then and there being, feloniously and wilfully did make an assault, and a certain cart of the value of ten dollars, then and there drawn by two horses, which he the said A. B. was then and there driving in and along the highway aforesaid, in, upon, and against the said C. D., feloniously and wilfully, did then and there force and drive; and him the said C. D. did thereby, then and there, throw to and upon the ground, and did then and there feloniously and wilfully force and drive one of the wheels of the said cart against, upon, and over the head of him the said C. D., then lying upon the ground, and thereby did then and there give

to the said C. D., in and upon the head of him the said C. D., one mortal fracture and contusion, of the breadth of four inches, and of the depth of four inches, of which said mortal fracture and contusion, the said C. D. then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B., him the said C. D., then and there, in manner and form aforesaid, feloniously, unlawfully, and wilfully, did kill and slay.(o) (*Conclude as in book 1, chapter 3.*)

(170) *Manslaughter. Against a husband for neglecting to provide shelter for his wife.*(p)

That before, upon, and during all the several days and times in this count hereinafter mentioned, and at, etc., G. P., late of the parish of N., in the county of Kent, laborer, was the husband of one M. P., she the said M. P., during all the days and times in this count mentioned, being sick, weak, diseased, distempered, and disordered in her body, and through such weakness, etc., unable to provide herself with such food, raiment, apparel, and shelter, as were necessary for the sustenance and protection of her body, and being unable, during all the days and times aforesaid, to provide herself with such medicines, care, and treatment, as were necessary for the cure and alleviation of her said sickness, etc.; all which several premises the said G. P., on all the days, etc., well knew; and the jurors aforesaid, etc., further present, that it was the duty of the said G. P., being such husband as aforesaid, during all the days and times aforesaid, to find, provide, and supply the said M. P. with competent and sufficient meat and drink for the sustenance of her body, and also with competent and sufficient apparel, lodging, and shelter for the protection of the body of the said M. P., and also with such medicines, care, and treatment as were necessary for the

(o) Davis's Precedents, 166; Starkie's C. P. 425.

(p) *R. v. Plummer*, 1 C. & K. 600. Though in this case the husband and wife separated by common consent, the husband granting the wife a stipulated allowance, which was regularly paid, it was held that if he knew, or was informed that she was without shelter, and refused to provide her with it, in consequence of which her death ensued, he was guilty of manslaughter (even though the wife was laboring under disease which must ultimately have proved fatal), if it could be shown that her death was accelerated for want of the shelter which he had denied. The facts not supporting the indictment, the defendant was acquitted. Wh. Cr. L. 8th ed. §§ 332, 518.

cure and alleviation of her said sickness, etc.; and the jurors aforesaid, etc., present, that the said G. P., on the nineteenth of November, one thousand eight hundred and forty-three, and on divers other days and times between that day and the twenty-fourth of November, one thousand eight hundred and forty-three, etc., at, etc., did assault the said M. P., and that the said G. P., on the said nineteenth of November, at, etc., feloniously and without lawful excuse, and contrary to his duty in that behalf, and against the will of the said M. P., did omit, neglect, and refuse to find, provide, and supply to the said M. P., competent and sufficient meat and drink for the sustenance of the body of the said M. P.; and also, during all the several days last aforesaid, at, etc., feloniously, without lawful excuse, contrary to his duty in that behalf, and against the will of the said M. P., did omit, neglect, and refuse to provide and supply the said M. P. with competent and sufficient apparel, lodging, and shelter for the protection of the body of the said M. P., and also during all the days last aforesaid, at, etc., feloniously without lawful excuse, contrary to his duty in that behalf, and against the will of the said M. P., did omit, neglect, and refuse to find, provide, and supply the said M. P. with such medicines, care, and treatment, as were necessary for the cure and alleviation of the said sickness, weakness, etc., by means of which said several premises, she the said M. P., on and from the said nineteenth of November, one thousand eight hundred and forty-three, until the said twenty-fourth of November, in the said year, did languish, and languishing did live, and then, to wit, on the said twenty-fourth of November, at, etc., in the year aforesaid, etc., of the said mortal sickness, weakness, distemper, and disorder of her body, did die. And the jurors, etc., do say, that the said G. P., her the said M. P., in manner and form aforesaid, feloniously did kill and slay, etc.(q)

(q) The second count was similar to the first, except that it omitted the allegations of assault, and also of the acts having been done against the will of the deceased. The third count charged the death to have been caused by the inclemency of the weather; and the fourth and fifth and sixth counts repeated severally the allegations in the second, relative to the omitting to supply clothing, lodging, food, and medicine.

(171) *Murder. In a duel fought without the state.*(r)

The jurors, etc., upon their oath present, that A. B., being an inhabitant of this state, to wit, of B. in the county of S., and commonwealth aforesaid, gentleman, by a previous appointment and engagement made within this state, to wit, at B., in the county of S., and commonwealth aforesaid, on the first day of May in the year aforesaid, with one C. D. to fight a duel without the jurisdiction of this state, to wit, at T., in the county of S., and state of M., did, afterwards, to wit, on the first day of June in the year aforesaid, at T., in the county of S., and state of M., fight a duel with the said C. D., and on the first day of June in the year aforesaid, with force and arms, at T. aforesaid, in the county aforesaid, in the state of M., in and upon the said C. D., feloniously, wilfully, and of his malice aforethought, make an assault; and that the said A. B. a certain pistol, then and there charged with gunpowder and one leaden bullet, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, against, and upon the said C. D.; and that the said A. B., with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said A. B. discharged and shot out of the said pistol as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound the said C. D., then and there giving to the said C. D., with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said A. B., in and upon the right side of the belly of the said C. D., one mortal wound, of the depth of four inches, and of the breadth of one inch; of which mortal wound, the said C. D., on and from the said first day of June in the year aforesaid, until the first day of July in the year aforesaid, within this state, to wit, at B., in the county of S., and commonwealth aforesaid, did suffer and languish, and languishing did live; and afterwards, to wit, on the first day of July in the year aforesaid, at B., in the county of S., and commonwealth aforesaid, of the mortal wound aforesaid, died. And so the jurors afore-

said, upon their oath aforesaid, do say, that the said A. B., him the said C. D. then and there, etc. (*as in usual form*).

(172) *Manslaughter in second degree, against captain and engineer of a steamboat, under New York Rev. Statute, p. 531, s. 46.(s)*

That A. B., late of the first ward of the city of New York, in the county of New York aforesaid, laborer, and C. D., late of the same place, also laborer, on the day of in the year of our Lord one thousand eight hundred and forty-seven (the said A. B. then and there being the captain of a certain steamboat used for the conveyance of passengers, known and distinguished by the name and title of the "Niagara," and then and there having charge of the said steamboat; and the said C. D., then and there being the said engineer of the said steamboat, having charge of the boiler of such boat, and other apparatus for the generation of steam), on the day and year aforesaid, and whilst the said steamboat was then and there navigated, sailed, and propelled in and upon a certain river and public highway, known and distinguished by the name and title of the Hudson River, at the ward, city, and county aforesaid, with force and arms, feloniously and unlawfully, from ignorance and gross neglect and for the purpose of excelling another boat (to wit, a certain other steamboat called the) in speed, did create and allow to be created such an undue quantity of steam as to burst and break the boiler of said boat, and other apparatus in which said steam was generated, and the other machinery and apparatus connected therewith, by which bursting and breaking, as well as by reason of the steam and scalding water escaping and issuing from and out of the said boiler and other apparatus, one E. F., in the peace of God and of the said people, then and there being; was then and there mortally burned, scalded, and wounded in and upon the head, neck, breast, back, stomach, and arms of him the said E. F., of which said mortal burns, scalds, and wounds, the said E. F. then and there instantly died.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. and C. D., him the said E. F., in the man-

(s) For this form I am indebted to J. B. Phillips, Esq., assistant district attorney in 1847 of the city of New York.

ner and by the means aforesaid, feloniously and wilfully did kill and slay. (*Conclude as in book I, chapter 3.*)

(173) *Against the engineer of a steamboat, for so negligently managing the engine that the boiler burst, and thereby caused the death of a passenger.*(t)

That Henry Robert Heasman, late of the parish of St. Martin in the Fields, in the county of Middlesex, and within the jurisdiction of the said court, engineer, on the twenty-seventh day of August, in the year of our Lord at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, was employed as an engineer in and on board a certain steamboat called the "Cricket," then and there floating on the waters of a certain river called the Thames, there situate, in and on board which said steamboat there then were divers, to wit, one hundred, of her majesty's liege subjects, as the said Henry Robert Heasman then and there well knew; and that the said Henry Robert Heasman, as such engineer as aforesaid, then and there had and took upon himself the care, charge, management, and control of a certain steam-engine and boiler, being then and there in and attached to the said steamboat, for the purpose of propelling the same, and in which said boiler there were then and there divers large quantities of boiling water, whereby to generate steam, whereby to work the said steam-engine, as the said Henry Robert Heasman then and there well knew; and that it then and there became and was the duty of the said Henry Robert Heasman, as such engineer as aforesaid, to regulate the quantity and amount of steam to be generated and retained within the said boiler, during the time the said boiler was used and employed for the purpose aforesaid, according to the strength and within the capacity of the said boiler. And the jurors aforesaid, upon their oath aforesaid, do say that the said Henry Robert Heasman, on the day aforesaid, in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, so having the care, charge, management, and control of the said boiler as aforesaid, did wilfully and feloniously neglect and omit to

regulate the quantity and amount of steam then and there being generated and retained in the said boiler, according to the strength and within the capacity of the said boiler, and did then and there wilfully, negligently, and feloniously permit and suffer a much larger amount of steam, to wit, ten thousand cubic feet of steam, to be generated and retained within the said boiler, than the said boiler was strong enough to contain and bear, and capable of containing and bearing, and that the said Henry Robert Heasman did then and there, by his said negligence in so permitting and suffering the said generation and retention of steam within the said boiler more than the said boiler was strong enough to contain and bear, and capable of containing and bearing as aforesaid, unlawfully and feloniously cause the said boiler to burst, and did then and there, by means of the said bursting of the said boiler, with force and arms, unlawfully and feloniously make an assault upon one Thomas Shed, the younger, on board the said steamboat then and there lawfully being, and the said Thomas Shed down upon and against the planks, iron, and timbers of the said steamboat, called the "Cricket," then and there unlawfully and feloniously did cast and throw, thereby then and there giving to the said Thomas Shed one mortal fracture of his skull, of which said mortal fracture of his skull the said Thomas Shed then and there died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Henry Robert Heasman, on the day aforesaid, in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, the said Thomas Shed, in manner aforesaid, unlawfully and feloniously did kill and slay, against the peace, etc.

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Henry Robert Heasman, afterwards, to wit, on the day aforesaid, in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, being then and there the engineer in and on board the said steamboat called the "Cricket," then and there floating on the waters of the said river called the Thames, there situate, and on board which said steamboat there were

then and there divers large numbers of her majesty's liege subjects, as the said Henry Robert Heasman then and there well knew, had and took upon himself, as such engineer as aforesaid, the care, charge, management, and control of a certain steam-engine and boiler, then and there being in and on board the said steamboat, and in which the said last mentioned boiler there were then and there divers large quantities of boiling water, for the purpose of generating steam, and thereby working the said engine, and that it then and there became and was the duty of the said Henry Robert Heasman then and there so to regulate, manage, and control the said last mentioned boiler as that all the surplus quantity of steam generated and made within the said last mentioned boiler, beyond such quantity of steam as the said last mentioned boiler was capable of containing, bearing, and retaining, might, from time to time, and at all times, so often as might be necessary, escape from and out of the said last mentioned boiler, through and by means of certain, to wit, four, safety-valves, which were then and there made and constructed in the said last mentioned boiler, for such purpose, as the said Henry Robert Heasman then and there well knew. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Henry Robert Heasman, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, so then and there having the care, charge, management, and control of the said last mentioned boiler, as last aforesaid, did then and there wilfully and feloniously neglect to regulate the quantity and amount of steam then and there generated and contained within the said last mentioned boiler as last aforesaid, and did then and there negligently, wilfully, and feloniously permit and suffer a larger quantity and amount of steam to be accumulated, confined, and retained within the said last mentioned boiler than the said last mentioned boiler was capable of containing and bearing, whereby it then and there became and was necessary that the said last mentioned steam should escape from and out of the said last mentioned boiler, through and by means of the said safety-valves, or one of them. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Henry Robert Heasman, well

knowing the premises, wilfully and feloniously did neglect so to regulate, manage, and control the said last mentioned boiler, as that the said last mentioned steam could escape from and out of the said last mentioned boiler, through and by means of the said four safety-valves, or one of them, and did then and there by means of his said negligence, as in this count aforesaid, unlawfully and feloniously cause the said last mentioned boiler to burst, and did then and there, by means of the said last mentioned bursting of the said boiler, with force and arms, unlawfully and feloniously make an assault upon the said Thomas Shed, and the said Thomas Shed, down upon and against the planks, iron, and timbers of the said steamboat, called the "Cricket," then and there unlawfully and feloniously did cast and throw, thereby then and there giving to the said Thomas Shed one mortal fracture of his skull, of which said last mentioned mortal fracture the said Thomas Shed then and there died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Henry Robert Heasman, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, the said Thomas Shed, in manner last aforesaid, unlawfully and feloniously did kill and slay, against the peace, etc.

Third count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Henry Robert Heasman, afterwards, to wit, on the day aforesaid, and in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, being then and there the engineer in and on board the said steamboat called the "Cricket," then and there floating on the waters of a certain river called the Thames, there situate, and in and on board which said steamboat there were then and there divers large numbers of her majesty's liege subjects, as the said Henry Robert Heasman then and there well knew, was intrusted with, and then and there took upon himself, as such engineer as aforesaid, the care, charge, management, and control of a certain steam-engine and boiler, then and there being in and on board the said steamboat, and in which said last mentioned boiler there were then and there divers large

quantities of water, by the boiling of which water divers large quantities of steam were then and there continually ascending and arising, and being generated and made within the said last mentioned boiler, and that the said last mentioned boiler was then and there made and constructed with, and then and there had certain, to wit, four, safety-valves and openings, through which all such steam within the said last mentioned boiler, so being generated and made as last aforesaid, beyond such steam as the said last mentioned boiler was capable of holding and containing, and was strong enough to hold and contain, might and could and would, from time to time, escape and find vent from and out of the said last mentioned boiler, without hurt or damage to any of her majesty's liege subjects; all which premises the said Henry Robert Heasman then and there well knew. And the jurors aforesaid, upon their oath aforesaid, do further say, that, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, and whilst divers large quantities of steam were being generated and made in the said last mentioned boiler, as in this count aforesaid, the said Henry Robert Heasman wilfully and feloniously did close, tie down, fasten, and keep closed, tied down, and fastened, the said four safety-valves of the said last mentioned boiler, and by such closing, tying down, and fastening, and keeping closed, tied down, and fastened, the said safety-valves, did then and there hinder and prevent the said steam, so being generated and made in the said last mentioned boiler as last aforesaid, from then and there escaping and finding vent from and out of the said last mentioned boiler, as it might and ought and otherwise would then and there have done, and thereby and by means of the premises in this count aforesaid, the said Henry Robert Heasman did then and there unlawfully and feloniously cause the said last mentioned boiler to burst, and did then and there, and by the means last aforesaid, with force and arms, unlawfully and feloniously make an assault upon the said Thomas Shed, and the said Thomas Shed, down upon and against the planks, iron, and timbers of the said steamboat, called the "Cricket," then and there unlawfully and feloniously did cast and throw, thereby then and there giving to the said Thomas Shed one mortal fracture of his skull, of

which said last mentioned mortal fracture the said Thomas Shed then and there died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Henry Robert Heasman, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, the said Thomas Shed, in manner last aforesaid, unlawfully and feloniously did kill and slay, against the peace, etc.

Fourth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Henry Robert Heasman, afterwards, to wit, on the day aforesaid, and in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, being such engineer as aforesaid, was intrusted with, and then and there took upon himself, the care, mangement, and control of a certain steam-engine and boiler, then and there being in the said steamboat called the "Cricket," in which said last mentioned boiler there was then and there a large quantity, to wit, ten thousand cubic feet, of steam, and it then and there became and was the duty of the said Henry Robert Heasman to provide for and secure the escape of a certain quantity, to wit, five thousand cubic feet, of the said steam, from and out of the said last mentioned boiler, in order to prevent the bursting of the said last mentioned boiler from the pressure of the said steam. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Henry Robert Heasman, well knowing the premises, but wilfully and feloniously neglecting his duty in that behalf, did not then and there provide for or secure the escape of the said part of the said steam from and out of the said last mentioned boiler, but, on the contrary thereof, wilfully, negligently, and feloniously did permit and suffer the said quantity, to wit, ten thousand cubic feet, of steam to be and remain in the said last mentioned boiler, by means of the retention of which said steam in the said last mentioned boiler, and the pressure thereof, the said last mentioned boiler did then and there burst and explode, and, by force of the said bursting and explosion, the said Thomas Shed, then and there lawfully being on board of the said steamboat, was then and there thrown and cast down upon

and against the planks, iron, and timbers of the said steamboat, by which said throwing and casting of the said Thomas Shed down upon and against the planks, iron, and timbers of the said steamboat, in manner last aforesaid, the said Henry Robert Heasman did then and there wilfully and feloniously give to the said Thomas Shed one mortal fracture of his skull, of which last mentioned mortal fracture the said Thomas Shed then and there died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Henry Robert Heasman, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, the said Thomas Shed, in manner last aforesaid, unlawfully and feloniously did kill and slay ; against the peace, etc.

Fifth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Henry Robert Heasman, afterward, to wit, on the day aforesaid, in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did wilfully and feloniously close, tie down, and fasten, and did keep closed, tied down, and fastened, certain, to wit, four, safety-valves of a certain boiler, in which said last mentioned boiler divers large quantities, to wit, ten thousand cubic feet, of steam, beyond such quantity of steam as the said last mentioned boiler was capable of bearing, were then and there accumulated, confined, and retained, and that thereby, and by means of the premises in this count mentioned, the said Henry Robert Heasman did then and there unlawfully and feloniously cause the said last mentioned boiler to burst, and did then and there, and by the means last aforesaid, with force and arms, unlawfully and feloniously make an assault upon the said Thomas Shed, and the said Thomas Shed, down upon and against the planks, iron, and timbers of a certain steamboat called the "Cricket," then and there being, then and there unlawfully and feloniously did cast and throw, thereby then and there giving to the said Thomas Shed one mortal fracture of his skull, of which said last mentioned mortal fracture the said Thomas Shed then and there died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Henry Robert

Heasman, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, the said Thomas Shed, in manner last aforesaid, unlawfully and feloniously did kill and slay; against the peace, etc.

Sixth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Henry Robert Heasman, afterwards, to wit, on the day aforesaid, in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did wilfully and feloniously, by causing to be made and generated within a certain boiler, and by keeping and retaining within the said last mentioned boiler divers large quantities, to wit, ten thousand cubic feet, of steam more than the said last mentioned boiler was strong enough and able to contain and bear, cause the said last mentioned boiler to burst, and did then and there, and by the means last aforesaid, with force and arms, unlawfully and feloniously make an assault upon the said Thomas Shed, and the said Thomas Shed, down upon and against the planks, iron, and timbers of a certain steamboat called the "Cricket," then and there being, then and there unlawfully and feloniously did cast and throw, thereby then and there giving to the said Thomas Shed one mortal fracture of his skull, of which said last mentioned mortal fracture the said Thomas Shed then and there died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Henry Robert Heasman, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, the said Thomas Shed, in manner last aforesaid, unlawfully and feloniously did kill and slay; against the peace, etc.

Seventh count.

(Charges an assault in other terms.)

(174) *Against agent of company for neglecting to give a proper signal to denote the obstruction of a line of railway, whereby a collision took place and a passenger was killed.*(u)

The jurors, etc., upon their oath present, that before and at the time of committing the felony hereinafter mentioned, George Pargeter, late of the parish of Shrivenham, in the county of Berks, laborer, on the eleventh day of May, in the year of our Lord at the parish aforesaid, in the county of Berks aforesaid, was a servant and policeman in the service and employ of a certain company, to wit, the Great Western Railway Company, in and upon a certain railway, to wit, the Great Western Railway. And the jurors aforesaid, upon their oath aforesaid, do further present, that before and at the time of committing the said felony, certain signal posts had been and were erected by the said company near to certain stations upon the said railway, for the purpose of making signals for the regulation, guidance, and warning of the drivers of locomotive engines attached to and drawing the trains of carriages traveling upon and along the said railway, which said signals were sufficient and proper for the purposes aforesaid, and were, at the time of the committing of the said felony, in constant use and in full force and effect, and well known to the said G. P., to wit, at the parish aforesaid, in the county of Berks aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further

(u) 1st. This indictment charges that the prisoner's duty was to attend to the proper working of the signals, according to the rules. Held, that it was not necessary to set out the rules. 2d. It appeared that the prisoner had many other duties besides attending to the signal posts, some of them being incompatible with his duty there. Held, that it was not necessary to set forth all the other duties, and then to negative that the prisoner was employed at the time in the discharge of either of such other duties. 3d. Held, that an averment that it was prisoner's duty to signal an obstruction, and there was an obstruction which prisoner neglected to signal, was a sufficient description of the offence, and that it was not necessary to aver that the prisoner's duty was, *if* there was an obstruction *and he saw it*, to signal it, and that there was an obstruction which he might have seen, but neglected to see. 4th. That it is sufficient to aver the duty to be to make a "proper signal," without further describing it. 5th. That a count which charged *both* a neglect to give the right signal, and the giving of the wrong signal, is not bad for duplicity. 6th. That it is sufficient to charge "that the prisoner did neglect and omit to alter the said signal," without stating more particularly what was the specific alteration which he so neglected to make. *R. v. Pargeter*, 3 Cox, C. C. 191; see Wh. Cr. L. 8th ed. §§ 305, 337, 338, 340.

present, that one of such signals, in such use and so used as aforesaid, and known to the said G. P. as aforesaid, when made, denoted, and was intended to denote and give warning and notice to the said drivers, that the line of the said railway, at the station near unto which the said signal was made, was then free from obstruction, and that the driver of any engine attached to and drawing any train of carriages then approaching the said station might safely pass through the same, with the train, without stopping, and which said signal was then and there called and known by the name of the "all right" signal; and that one other of such signals, so used as aforesaid, and known to the said G. P. as aforesaid, when made, denoted, and was intended to denote and give warning and notice to the said drivers, that the line of the said railway near to which the said last mentioned signal was made, was then obstructed, and that the driver of any engine attached to and drawing any train of carriages then approaching the said station could not safely pass through the same, with the train, without stopping, and which said last mentioned signal was then and there called and known by the name of the signal "to stop." And the jurors aforesaid, upon their oath aforesaid, do further present, that certain rules and directions had been and were at the time of the committing of the said felony established for the guidance of the conduct of the servants and policemen of the said company, employed in and upon the said railway, and having the care and regulation of the said signals, and which said rules and regulations were sufficient and proper for the purposes aforesaid, and were, at the time of committing the said felony, in full force and effect, and well known to the said G. P., to wit, at the parish aforesaid, in the said county of Berks. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said G. P., on the day and year aforesaid, at the parish aforesaid, in the county of Berks aforesaid, in and upon one Arthur Augustus Lea feloniously did make an assault; and that the said G. P., so being such servant and policeman in the service and employment of the said Great Western Railway Company as aforesaid, then and there had, by virtue of such his employment, the care and regulation of the said signals, at a certain signal post erected and being near a certain station on

the said line of the said railway, to wit, the Shrivenham Station, and near the line of the said railway there, and that before and on the said eleventh day of May, in the year aforesaid, at the parish aforesaid, in the county of Berks aforesaid, it became and was the duty of the said G. P. to attend to the due and proper righting, exhibiting, and making of the said signals at the said last mentioned station, and duly and properly to work, exhibit, and make the same, according to the rules and regulations there established for the guidance of the conduct of the servants and policemen of the said company, employed in and upon the said railway as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that on the day and year aforesaid, at the parish aforesaid, in the county of Berks aforesaid, a certain train of carriages drawn by a locomotive engine, under the care and guidance of a certain driver thereof, to wit, one Robert Roscoe, was travelling on the said railway, to wit, from Exeter to London, and was before and at the time of the committing of the felony by the said G. P., as hereinafter mentioned, due at the said Shrivenham Station, to wit, at the hour of three of the clock in the afternoon of the said eleventh day of May, and was expected and intended, according to the time table and regulations by the said company in that behalf established, to arrive and pass through the said Shrivenham Station at the time and hour last aforesaid, as the said G. P. then and there well knew; and that the said G. P. had then and there, in expectation of the arrival of the said last mentioned train of carriages, made and turned on the signal called the "all right" signal. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and before the arrival of the said last mentioned train of carriages at the Shrivenham Station, to wit, on the day and year aforesaid, at the parish aforesaid, in the county of Berks aforesaid, a certain carriage, to wit, a horse box, was put and placed and continued, and was upon and across and obstructing the same line of rails of the said railway, near to the said Shrivenham Station, as that on which the said last mentioned train of carriages was then travelling, and it thereupon then and there, and in consequence of such last mentioned obstruction, became and was the duty of the said G. P. to alter, remove,

and turn off the said signal called the "all right" signal, and to make, turn on, and keep made and turned on, the said signal called the signal "to stop." And the jurors aforesaid, upon their oath aforesaid, do further present, that the said G. P., then and there being wholly unmindful and neglectful of his duty in that behalf, at the time and place last aforesaid, on the day and year aforesaid, at the parish aforesaid, in the county of Berks aforesaid, with force and arms, unlawfully and feloniously did neglect and omit to alter, remove, and turn off the said signal called the "all right" signal, and did then and there unlawfully and feloniously neglect and omit to make, turn on, and keep made and turned on, the said signal called the signal "to stop." By means of which said several premises, and of the said felonious omissions and neglect by the said G. P. as aforesaid, the driver of the engine attached to the said last mentioned train of carriages, to wit, the said R. R., was induced to believe, and did believe, that the line of rails of the said railway, upon which the last mentioned train of carriages was then travelling, was then all clear and without obstruction, and that the said driver, to wit, the said R. R., might then safely pass through the said Shrivenham Station with the last mentioned engine and train of carriages without stopping; and the said driver, to wit, the said R. R., acting upon such belief as aforesaid, did there-upon, on the day and year aforesaid, at the parish aforesaid, in the county of Berks aforesaid, drive the said engine, so attached to and drawing the last mentioned train of carriages as aforesaid, through the said Shrivenham Station, and, in so drawing the said last mentioned train of carriages, did then and there unavoidably, and without any fault or default of the said R. R., with great force come into violent contact and collision with the said carriage, called a horse box, then being on, upon, and across and obstructing the same line of rails of the said railway as that on which the said last mentioned train of carriages was then travelling, near to the said Shrivenham Station there, by means of which said contact and collision, caused and occasioned as aforesaid, the said A. A. L., then lawfully being and travelling in one of the carriages of the said last mentioned train of carriages, was then and there violently and forcibly thrown on and against the back and sides of the

said carriage in which he was so travelling as aforesaid, and was then and there violently and forcibly cast and thrown from and out of the said carriage in which he was so travelling as aforesaid, down to and upon the ground there; by means of which said casting and throwing of the said A. A. L., as well to and against the sides and back of the said carriage in which he was so travelling as aforesaid, as from and out of the said carriage, down to and upon the ground there as aforesaid, the said A. A. L. then and there had and received, and the said G. P. then and there feloniously did give and cause to be given to the said A. A. L. divers mortal wounds, bruises, and contusions, in and upon the head, body, arms, and legs of the said A. A. L., and divers mortal fractures of both the legs of the said A. A. L., and divers mortal ruptures of the bloodvessels in and upon the brain of the said A. A. L., of which said mortal wounds, bruises, and contusions, mortal fractures, and mortal ruptures of the said A. A. L., on and from the said eleventh day of May, in the year aforesaid, as well at the parish of Shrivenham aforesaid, in the county of Berks aforesaid, as at the parish of Swindon, in the county of Wilts, did languish, and languishing did live, and there, to wit, on the day and year last aforesaid, at the parish of Swindon aforesaid, in the county of Wilts aforesaid, of the said mortal wounds, bruises, and contusions, mortal fractures, and mortal ruptures, did die. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said G. P., in manner and form aforesaid, the said A. A. L., at the parish of Swindon aforesaid, in the county of Wilts aforesaid, feloniously did kill and slay, against the peace, etc.

Second count.

The second count states, that "it was the duty of the said G. P., as such servant and policeman as aforesaid, to make certain signals to the drivers of locomotive engines attached to and drawing or propelling trains travelling upon and along the said railway, and passing along the same at a certain part thereof, to wit, near a certain station, to wit, the said Shrivenham Station, to wit, at the parish of Shrivenham aforesaid, in the county of Berks aforesaid, for the purpose of giving warning and notice to the said drivers, whether the line of rails on the said railway

on and upon which any such locomotive engine and train of carriages as aforesaid, should or might be passing at, near, and through the said Shrivenham Station, was free of obstruction or not, of all which the said G. P., at the time of the committing of the said felony, had full knowledge and notice, to wit, at the day and year last aforesaid, at the parish last aforesaid, in the county of Berks aforesaid." It then proceeds to aver that a train was travelling on the line, "on and along the part of the said railway which lies in the said parish, etc., and up to and towards the place where it was the duty of the said G. P. to make such signals as aforesaid," and that just before the time of its arrival at the said place, "there was a certain obstruction on and upon the same line of rails as that upon which the said last mentioned locomotive engine and train was travelling, to wit, a certain horse box, standing, and being upon and across the said last mentioned line of rails, near to the place where it was the duty of the said G. P. to make such signals as last aforesaid, to wit, at the parish last aforesaid, in the county of Berks. And the said G. P. could, and might, and ought, then and there, to wit, at the parish last aforesaid, in the county of Berks, on the said eleventh day of May, in the year aforesaid, in the course of his duty, and in the exercise of reasonable and proper skill and diligence, to have given warning and notice by means of the proper signal to the driver of the said last mentioned locomotive engine, attached to and drawing the last mentioned train of carriages, to wit, the said R. R., that there was then such obstruction as last aforesaid, in and upon the said line of rails, to wit, the said horse box. And the jurors, etc., do further present, that the said G. P., then and there being wholly unmindful and neglectful of his duty in that behalf, on, etc., at the parish, etc., with force and arms, unlawfully and feloniously did neglect and omit to give notice and warning, by means of the proper signal, to the driver of the last mentioned locomotive engine attached to and drawing the said last mentioned train of carriages, to wit, the said R. R., that there was an obstruction upon the same line of rails as that on which the said last mentioned train of carriages was then travelling, by means of which," etc.

Third count.

The third count states the averment of the signals, and of the prisoner's duty, thus: Reciting, that the said G. P. was in the employ, etc., as a policeman, and that "for the safe and proper working and travelling of the several trains of carriages and locomotive engines proceeding along and upon the said railway, certain signals had been and were at the time of the committing of the offence by the said G. P., as hereinafter mentioned, established by the said company at and near a certain station upon the said railway, and at and near the said station, to wit, the Shrivenham Station, at which the said G. P. was employed as aforesaid, and were well known to the said G. P., to wit, at the parish last aforesaid, in the county of Berks aforesaid. And the jurors, etc., do further present, that on the said, etc., at the parish, etc., the said G. P. had the care and control of the said signals, at the said station, to wit, the Shrivenham Station, at which the said G. P. was so employed as servant or policeman as aforesaid, and it then and there became and was the duty of the said G. P., by virtue of such his employment as aforesaid, from time to time, and at all times, as occasion might require, to make due and proper signals to the drivers of all locomotive engines travelling along and upon the said railway, and entering the said station, to wit, the Shrivenham Station." The count then proceeds to set forth, that a train was travelling on the said line of railway, that a horse box had been placed upon and across it so as to obstruct the passage of the train, "and that it thereupon then and there became the duty of the said G. P. to indicate by proper signals to the driver of the said last mentioned train of carriages so due and about to enter and pass through the said last mentioned station as aforesaid, that the line of rails of the said railway upon which the said last mentioned train of carriages were then travelling, was there obstructed. And the jurors, etc., do further present, that the said G. P. afterwards, to wit, on the day, etc., at the parish, etc., wholly neglecting his duty in that behalf, with force and arms, unlawfully and feloniously did neglect and omit to indicate by proper signals to the driver of the said last mentioned train of carriages so travelling upon the said railway as aforesaid, and

so due, and about to enter and pass through the said last mentioned station as aforesaid, that the line of rails of the said railway upon which the said last mentioned train of carriages was then travelling, was then obstructed, but on the contrary thereof, the said G. P., then and there, unlawfully and feloniously did indicate by signals to the driver of the said last mentioned train of carriages, that the line of rails of the said railway, on which the said last mentioned train of carriages was then travelling, at or near the said last mentioned station, was then all clear and free from obstructions, by means of which several premises and the said felonious omissions and neglects of the said G. P.," etc. etc.

[*The fourth count was a common count for manslaughter, by assaulting, beating, and bruising, etc.*]

(175) *Against the driver and stoker of a railway engine, for negligently driving against another engine, whereby the deceased met his death.*(v)

The jurors, etc., upon their oath present, that S. H., late of the parish of Richmond, in the county of Surrey, laborer, and W. W., late of the same place, laborer, on the seventeenth day of November, in the year of our Lord with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, in and upon R. P. feloniously and wilfully did make an assault. And the jurors aforesaid, upon their oath aforesaid, do further present, that before and on the said seventeenth day of November, the said S. H. was employed by a certain body corporate, to wit, the London and South-Western Railway Company, for the purpose of conducting, driving, managing, and controlling certain locomotive steam-engines belonging to the said London and South-Western Railway Company, and that the said W. W., before and on the day and year aforesaid, was employed by the London and South-Western Railway Company, for the purpose of assisting the said S. H. in the conducting, driving, management, and control of such locomotive steam-engines as aforesaid, and that, by virtue of such their respective employments, the said S. H. was, on the

day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, conducting and driving, and then and there had the management and control of a certain locomotive steam-engine, to and behind which a certain carriage, called a tender, was then and there attached, and which said locomotive steam-engine and tender were then and there the property of and belonging to the said London and South-Western Railway Company, and were then and there in and upon a certain side line of railway leading into and upon a certain main line, to wit, the Richmond Railway, and the said W. W. was then and there, the said S. H., in and about the said conducting, driving, management, and control of the said locomotive steam-engine and tender, aiding and assisting, and that it then and there became and was the duty of the said S. H. and of the said W. W., by virtue of their said employment, not to conduct or drive, or suffer or permit to be conducted or driven, the said locomotive steam-engine and tender from and off the said line of railway, into, upon, or across the said main line of railway, in case any train or engine should be then due, and about to arrive at that part of the said main line of railway where the same was joined by the said line of railway aforesaid; yet the said S. H. and the said W. W., well knowing the premises, and well knowing that a certain train, to wit, a train consisting of a certain other locomotive steam-engine, with a certain other tender, and divers, to wit, twenty, carriages attached thereto and drawn thereby, was then and there lawfully travelling, and being propelled on and along the said main line of railway, and was then due and about to arrive at that part of the said main line of railway where the same was joined by the side line of railway aforesaid; but disregarding their duty in that behalf, did, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, wilfully and feloniously, and with great force and violence, and in a wanton, negligent, and improper manner, and contrary to their said duty in that behalf, and while the said train was so then and there due, and about to arrive as aforesaid, conduct and drive, and suffer and permit to be conducted and driven, the said first mentioned locomotive steam-engine and tender from and off the said line

of railway, into, upon, and across the said main line of railway, and into, upon, and against the said train so then and there lawfully travelling and being propelled on and along the said main line of railway as aforesaid; and that the said S. H. and the said W. W. did thereby, and by means of the said several premises, and by reason of the shock and concussion thereby given and communicated to the said first mentioned locomotive steam-engine, then and there wilfully and feloniously, and with great force and violence, push, force, dash, drive, and jam, and cause to be pushed, forced, dashed, driven, and jammed in, upon, over, against, and between a certain part of the said first mentioned locomotive steam-engine, to wit, the hinder part thereof, the said R. P., who was then and there standing and being in and upon the said first mentioned locomotive steam-engine, and did then and there, by means of the pushing, forcing, dashing, and driving and jamming aforesaid, wilfully and feloniously inflict and cause to be inflicted in and upon the head, to wit, in and upon the right side of the head of the said R. P., divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs, and feet of the said R. P., divers mortal wounds, bruises, contusions, burns, and scalds, of which said several mortal wounds, fractures, bruises, contusions, burns, and scalds, the said R. P., on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said S. H. and the said W. W., the said R. P., in the manner and by the means aforesaid, wilfully and feloniously did kill and slay, against the peace, etc.

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said S. H. and the said W. W., on the day and year aforesaid, with force and arms, at the parish of Richmond, in the county of Surrey, and within the jurisdiction of the said court, in and upon the said R. P., feloniously and wilfully did make an assault. And the jurors aforesaid, upon their oath aforesaid, do further present, that before and on the day and year aforesaid, the said S. H. was employed by a certain corpo-

rate body, to wit, the London and South-Western Railway Company, for the purpose of conducting, driving, managing, and controlling certain locomotive steam-engines belonging to the said London and South-Western Railway Company, and the said W. W., before and on the day and year aforesaid, was employed by the said London and South-Western Railway Company, for the purpose of assisting the said S. H. in the conducting, driving, management, and control of such locomotive steam-engines as aforesaid, and that by virtue of such their respective employments, the said S. H. was, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, conducting and driving, and then and there had the management and control of a certain locomotive steam-engine, to and behind which a certain carriage, called a tender, was then and there attached, and which said locomotive steam-engine and tender were then and there the property of and belonging to the said London and South-Western Railway Company, and were then and there in and upon a certain side line of railway, leading into and upon a certain main line of railway, to wit, the Richmond Railway, and that the said W. W. was then and there, the said S. H., in and about the said conducting, driving, management, and control of the said locomotive steam-engine and tender, aiding and assisting, and that it then and there became and was the duty of the said S. H. and of the said W. W., by virtue of their said employment, not to conduct or drive, or suffer or permit to be conducted or driven, the said locomotive steam-engine and tender from and off the said line of railway, into, upon, or across the said main line of railway, in case any train or engine should be then due and about to arrive at that part of the said main line of railway where the same was joined by the said line of railway aforesaid; yet the said S. H. and the said W. W., well knowing the premises, and well knowing that a certain train, consisting of another locomotive steam-engine, with a certain other tender, and divers, to wit, twenty, carriages attached thereto, and drawn thereby, was then and there lawfully travelling and being propelled on and along the said main line of railway, and was then due and about to arrive at that part of the said main line of railway where the same

was joined by the side line of railway aforesaid, but disregarding their duty in that behalf, did, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, wilfully and feloniously, and with great force and violence, wilfully and in a wanton, negligent, and improper manner, contrary to their said duty in that behalf, and while the said train was so then and there due and about to arrive as aforesaid, conduct and drive, and suffer and permitted to be conducted and driven, the said first mentioned locomotive steam-engine and tender from and off the said line of railway, into, upon, and across the said main line of railway, and thereby and by reason of the said premises, and of the several negligent and improper conduct of the said S. H. and of the said W. W., the said train so then travelling and being propelled on and along the said main line of railway, did then and there unavoidably, with great force and violence, strike, run, and impinge against the said first mentioned locomotive steam-engine; and by means of the said several premises, and of the shock and concussion thereby given and communicated to the said first mentioned locomotive steam-engine, the said R. P., who was then and there standing and being in and upon the said first mentioned locomotive steam-engine, was then and there, with great force and violence, pushed, forced, dashed, driven, and jammed in, upon, over, and between a certain part of the said first mentioned locomotive steam-engine, to wit, the hinder part thereof, and by means of the said pushing, forcing, dashing, driving, and jamming, then and there were made and inflicted in and upon the head, to wit, in and upon the right side of the head of the said R. P., divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs, and feet of the said R. P., divers mortal wounds, bruises, contusions, burns, and scalds, of which said several mortal wounds, fractures, bruises, contusions, burns, and scalds, the said R. P., on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died. And so the jurors, etc.

Third count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said S. H. and the said W. W., on the day and year aforesaid, with force and arms, at the parish of Richmond aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said court, in and upon the said R. P. feloniously and wilfully did make an assault, and that the said S. H. was then and there conducting and driving, and then and there had the management and control of a certain locomotive steam-engine, to and behind which a certain carriage, called a tender, was then and there attached, and which said locomotive steam-engine and tender were then and there in and upon a certain way, to wit, a certain side line of railway leading into and upon a certain main line of railway, to wit, the Richmond Railway, and that the said W. W. was then and there, the said S. H., in and about the said conducting, driving, management, and control of the said locomotive steam-engine and tender, aiding and assisting; and that it then and there became and was the duty of the said S. H., and of the said W. W., to use all due and proper caution in and about the conducting and driving the said locomotive steam-engine and tender, from and off the said side line of railway, in, upon, or across the said main line of railway, yet the said S. H. and the said W. W., well knowing the premises, and not regarding their duty in that behalf, did not, nor would use all due and proper caution in and about the conducting and driving of the said locomotive steam-engine and tender, from and off the said side line of railway, in, upon, or across the said main line of railway; but on the contrary thereof, did then and there, wilfully and feloniously, and with great force and violence, and without due and proper caution, and in a negligent and improper manner, and contrary to their said duty in that behalf, conduct and drive the said locomotive steam-engine and tender from and off the said side line of railway, into, upon, and across the said main line of railway, and into, upon, and against a certain train, to wit, a train consisting of another locomotive steam-engine, with a certain other tender, and divers, to wit, twenty, carriages attached thereto, and drawn thereby, which said train was then and there

lawfully travelling and being propelled on and along the said main line of railway; and that the said S. H. and W. W. did thereby and by means of the said several premises, and by reason of the shock and concussion thereby given and communicated to the said first mentioned locomotive steam-engine, then and there wilfully and feloniously, and with great force and violence, push, force, dash, drive, and jam, and cause to be pushed, forced, dashed, driven, and jammed in, upon, over, and between a certain part of the said first mentioned locomotive steam-engine, to wit, the hinder part thereof, the said R. P., who was then and there standing, and being in and upon the said first mentioned locomotive steam-engine, and did then and there, by means of the said pushing, forcing, dashing, driving, and jamming, wilfully and feloniously inflict, and cause to be inflicted, in and upon the head, to wit, in and upon the right side of the head of the said R. P., divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs, and feet of the said R. P., divers mortal wounds, bruises, contusions, burns, and scalds, of which said several mortal wounds, fractures, bruises, contusions, burns, and scalds, the said R. P., on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died. And so the jurors aforesaid, etc.

Fourth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said S. H. and the said W. W., on the day and year aforesaid, with force and arms, at the parish of Richmond aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said court, in and upon the said R. P. feloniously did make an assault, and that the said S. H. was then and there conducting and driving, and then and there had the management and control of a certain locomotive steam-engine, to and behind which a certain carriage, called a tender, was then and there attached, and which said locomotive steam-engine and tender were then and there in and upon a certain way, to wit, a certain side line of railway, leading into and upon a certain main line of railway, to wit, the Richmond Railway, and

that the said W. W. was then and there, the said S. H., in and about the said conducting, driving, management, and control of the said locomotive steam-engine and tender, aiding and assisting, and that it then and there became and was the duty of the said S. H., and of the said W. W., to use all due and proper caution in and about the conducting and driving the said locomotive steam-engine and tender from and off the said side line of railway, in, upon, or across, the said main line of railway; yet the said S. H., and the said W. W., well knowing the premises, and not regarding their duty in that behalf, did not, nor would use all due and proper caution in and about the conducting and driving of the said locomotive steam-engine and tender, from and off the said side line of railway, in, upon, or across the said main line of railway, but on the contrary thereof, did then and there wilfully and feloniously, and with great force and violence, and without due and proper caution, and in a negligent and improper manner, and contrary to their said duty in that behalf, conduct and drive the said locomotive steam-engine and tender from and off the said side line of railway, into, upon, and across the said main line of railway, and thereby and by reason of the said several premises, and of the said negligent and improper conduct of the said S. H., and of the said W. W., a certain train, to wit, a train consisting of a certain other locomotive steam-engine, with a certain other tender, and divers, to wit, twenty, carriages attached thereto, and drawn thereby, which said train was then and there lawfully travelling and being propelled on and along the said main line of railway, did then and there inadvertently, with great force and violence, strike, run, and impinge upon and against the said first mentioned locomotive steam-engine, and by means of the said several premises, and of the shock and concussion thereby given and communicated to the said first mentioned locomotive steam-engine, the said R. P., who was then and there standing and being in and upon the said first mentioned locomotive steam-engine, was then and there, with great force and violence, pushed, forced, dashed, driven, and jammed in, upon, against, over, and between a certain part of the said first mentioned locomotive steam-engine, to wit, the hinder part thereof, and by means of the said pushing, forcing, dashing, driving, and jam-

ming, then and there were made and inflicted in and upon the head, to wit, in and upon the right side of the head of the said R. P., divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs, and feet of the said R. P., divers mortal wounds, bruises, contusions, burns, and scalds, of which said several mortal wounds, fractures, bruises, contusions, burns, and scalds, the said R. P., on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died. And so the jurors aforesaid, etc.

Fifth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said S. H. and the said W. W., on the day and year aforesaid, with force and arms, at the parish of Richmond aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said court, in and upon the said R. P. feloniously and wilfully did make an assault; and that the said S. H., and the said W. W., a certain locomotive steam-engine, to and behind which a certain carriage, called a tender, was then and there attached, and which said locomotive steam-engine and tender were then and there being forced and propelled by the power of steam on and along a certain way, to wit, a railway, and which said locomotive steam-engine and tender, the said S. H. was then and there managing, controlling, conducting, and driving, in and along the said railway, and in the managing, controlling, conducting, and driving whereof the said W. W. was then and there the said S. H. aiding and assisting, did then and there wilfully and feloniously, by the wanton and felonious negligence of them and each of them respectively, and by the wilful and felonious disregard of the duties incumbent upon them, and each of them respectively, in that behalf, cause, occasion, permit, and suffer to strike and run into, upon, and against, and to be with great force and violence forced, driven, and dashed into, upon, and against a certain other locomotive steam-engine, to which said last mentioned locomotive steam-engine a certain other tender and divers, to wit, twenty, carriages, were then and there attached, and which said last mentioned locomotive steam-engine and tender and carriages were then and there

lawfully travelling and being propelled on and along the said railway, and that the said S. H., and the said W. W., did thereby, and by means of the said several premises, and by reason of the shock and concussion thereby caused and communicated to the said first mentioned locomotive steam-engine and tender, then and there wilfully and feloniously, and with great force and violence, push, force, dash, drive, and jam, and cause to be pushed, forced, dashed, driven, and jammed in, upon, over, and between a certain part of the said first mentioned locomotive steam-engine, to wit, the hinder part thereof, the said R. P., who was then and there standing and being in and upon the said first mentioned locomotive steam-engine, and did then and there, and by means of the said pushing, forcing, dashing, driving, and jamming, wilfully and feloniously inflict, and cause to be inflicted, in and upon the head, to wit, the right side of the head of the said R. P., divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs, and feet of the said R. P., divers mortal wounds, contusions, bruises, burns, and scalds, of which said several wounds, fractures, contusions, bruises, burns, and scalds, the said R. P., on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died. And so the jurors aforesaid, etc.

Sixth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said S. H. and the said W. W., on the day and year aforesaid, with force and arms, at the parish of Richmond aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said court, in and upon the said R. P. feloniously and wilfully did make an assault, and that the said S. H. and the said W. W., a certain locomotive steam-engine, to and behind which a certain carriage, called a tender, was then and there attached, and which said locomotive steam-engine and tender were then and there being forced and propelled by the power of steam on and along a certain way, to wit, a railway, and which said locomotive steam-engine and tender the said S. H. was then managing, controlling, conducting, and driving in and along the said railway, and in the

managing, controlling, conducting, and driving whereof the said W. W. was then and there the said S. H. aiding and assisting, did then and there wilfully and feloniously, and by the wanton and felonious negligence of them and each of them respectively, and by the wilful and felonious disregard of the duties incumbent upon them and each of them respectively in that behalf, and with great force and violence, conduct, drive, and propel, and cause and permit to be conducted, driven, and propelled to, upon, along, and across a certain other part of the railway aforesaid, and thereby and by reason of the said several premises, and of the said wilful and felonious negligence of the said S. H., and of the said W. W., a certain train, to wit, a train consisting of a certain other locomotive steam-engine, with a certain other tender, and divers, to wit, twenty, carriages attached thereto and drawn thereby, and which said train was then and there lawfully travelling and being propelled on and along the said last mentioned part of the said line of railway, did then and there unavoidably and with great force and violence strike, drive, dash, and impinge upon and against the said first mentioned locomotive steam-engine; and by means of the said several premises, and of the shock and concussion thereby given and communicated to the said first mentioned locomotive steam-engine, the said R. P., who then and there was standing and being in and upon the said first mentioned locomotive steam-engine, was then and there, with great force and violence, pushed, forced, dashed, driven, and jammed in, upon, over, and between a certain part of the said first mentioned locomotive steam-engine, to wit, the hinder part thereof, and by means of the said pushing, forcing, dashing, driving, and jamming, then and there were inflicted in and upon the head, to wit, in and upon the right side of the head of the said R. P., divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs, and feet of the said R. P., divers mortal wounds, bruises, contusions, burns, and scalds, of which said mortal wounds, fractures, bruises, contusions, burns, and scalds, the said R. P., on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died. And so the jurors, etc.

Seventh count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said S. H. and the said W. W., on the day and year aforesaid, with force and arms, at the parish of Richmond aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said court, in and upon the said R. P. feloniously and wilfully did make an assault, and that the said S. H. and W. W., a certain locomotive steam-engine, to and behind which a certain carriage, called a tender, was then and there attached, and which said locomotive steam-engine and tender were then and there the property of a certain corporate body, to wit, the London and South-Western Railway Company, and were then and there lawfully standing and being in and upon a certain railway, to wit, at and near a certain station belonging to the said railway, did then and there wilfully and feloniously, and without any lawful authority in that behalf, and with great force and violence, conduct, drive, and propel, and cause, permit, and suffer to be conducted, driven, and propelled away from the said station along, to, upon, and across a certain other part of the railway aforesaid, and thereby and by reason of the said several premises a certain train, to wit, a train consisting of a certain other locomotive steam-engine, with a certain other tender, and divers, to wit, twenty, carriages attached thereto and drawn thereby, and which said train was then and there lawfully travelling and being propelled on and along the line of the said railway, did then and there unavoidably and with great force and violence strike, dash, drive and impinge upon and against the said first mentioned locomotive steam-engine; and by means of the said several premises, and of the shock and concussion thereby given and communicated to the said first mentioned locomotive steam-engine, the said R. P., who then and there was standing and being in and upon the said first mentioned locomotive steam-engine, was then and there, with great force and violence, pushed, forced, dashed, driven, and jammed in, upon, over, and between a certain part of the said first mentioned locomotive steam-engine, to wit, the hinder part thereof, and by means of the said pushing, forcing, dashing, driving, and jamming, then and there were made and inflicted,

in and upon the head, to wit, in and upon the right side of the head of the said R. P., divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs, and feet of the said R. P., divers mortal wounds, bruises, contusions, burns, and scalds, of which said several mortal wounds, fractures, bruises, contusions, burns, and scalds, the said R. P., on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died, and so the jurors, etc.

(176) *Involuntary manslaughter in Pennsylvania, by striking an infant with a dray.*

That C. M'G., late of the county aforesaid, porter, on the day of in the year, etc., with force and arms, at the city of Philadelphia, in the county aforesaid, in and upon one S. G., an infant of tender years, to wit, of the age of two years, and in the peace of God and the commonwealth, then and there being, did make an assault; and that the said C. M'G., then and there driving one horse drawing a dray, did then and there, in the city aforesaid, unlawfully and violently drive the said horse, so as aforesaid drawing the said dray, to and against the said S. G., and that he the said C. M'G., with one of the wheels of the said dray, did then and there, in the city aforesaid, by such driving, unlawfully and violently, the said S. G., drive, force, and throw to the ground, by means whereof, one of the wheels of the said dray, against, upon, and over the head of the said S., did strike and go, thereby and then and there given unto the said S. one mortal fracture and contusion, of which said mortal fracture and contusion, she the said S., on the same day and year aforesaid, at the county aforesaid, died, and so the inquest aforesaid, upon their oaths and affirmations aforesaid, do say, that the said C. M'G., her the said S. G., in manner and by the means aforesaid, unlawfully did kill, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(177) *Murder on the high seas. General form as used in the United States courts. (With commencement and conclusion as adopted in the federal courts of New York.)(w)*

First count. By striking with a sharp instrument.

Southern District of New York, ss. The jurors of the United States of America, within and for the circuit and district aforesaid, on their oath present, that late of the city and county of New York, in the circuit and district aforesaid, mariner, late of the city and county of New York, in the circuit and district aforesaid, mariner, and (*if as many as three were engaged*) late of the city and county of New York, in the circuit and district aforesaid, mariner, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the day of in the year of our Lord one thousand eight hundred and with force and arms, upon the high seas, out of the jurisdiction of any particular state of the said United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain vessel being a called the owned by a certain person or persons whose names are to the said jurors unknown, being a citizen or citizens of the United States of America, in and upon one in the peace of God and the said United States, then and there being on board said called the on the high seas, out of the jurisdiction of any particular state of the said United States of America, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, piratically, feloniously, wilfully, and of their malice aforethought, did make an assault, and that the said with a certain instrument of called a of the value of which he the said in his hand then and there had and held, upon the of him the said then and there being on the high seas, in the aforesaid, and out of the jurisdiction of any particular state of the

(w) This indictment, which is framed with great accuracy, is that on which Babe, the pirate, was convicted in the Southern District of New York. This and the remaining federal forms from New York were obtained from Mr. Mayberry, assistant to the U. S. district attorney.

said United States, and within the jurisdiction of this court, then and there feloniously, wilfully, and of his malice aforethought, did strike, giving the said with the aforesaid, in manner aforesaid, in and upon the of him the said several mortal strokes, wounds, and bruises, to wit, one mortal wound on the of him the said of the length of inches, and of the depth of inches, of which said mortal wound the said on the high seas aforesaid, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, instantly died (*or otherwise*), and that the said then and there feloniously, wilfully, and of their malice aforethought, were present aiding and assisting the said in the felony and murder aforesaid, in manner and form aforesaid to do and commit; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said in manner and form aforesaid, piratically, feloniously, and of their malice aforethought, did kill and murder, against the peace of the said United States of America and their dignity, and against the form of the statute of the said United States in such case made and provided.

Second count.

(*Same as first count, substituting*): “owned by citizens (*or a citizen*) of the United States of America,” for “owned by a certain person or persons, whose names are to the said jurors unknown, being a citizen of the United States of America.”

Third count.

(*Same as second count, specifying one other of the persons engaged, as principal, and the others as aiders and abettors.*)

Fourth count.

(*Same as third count, specifying one other of the persons engaged, as principal, and the others as aiders and abettors, and so on until the number is exhausted.*)

Fifth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that late of the city and county of New York,

in the circuit and district aforesaid, mariner, late of the same place, in the circuit and district aforesaid, mariner, and late of the same place (*or otherwise*), not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the day of in the year of our Lord one thousand eight hundred and with force and arms, on the high seas, out of the jurisdiction of any particular state of the said United States of America, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, on board of a certain vessel being a called the owned by citizens of the United States of America, in and upon one in the peace of God and the said United States, then and there being on board the said called the on the high seas, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, piratically, feloniously, wilfully, and of their malice aforethought, did make an assault; and the said with a certain instrument of called a of the value of which he the said then and there in his hand had and held, and the said (*here specify one other*) with a certain other instrument of called a of the value of which he the said in his hand then and there had and held, and the said (*here specify one other, if as many are contained in the complaint*) with a certain other instrument of called a of the value of which he the said in his hand then and there had and held, the said in and upon the head, face, breast, and other parts of the body of him the said then and there being on the high seas, in the said called the out of the jurisdiction of any particular state, and within the jurisdiction of this court, then and there feloniously, wilfully, and of their malice aforethought, did strike and beat, giving him, the said then and there with the aforesaid, by such striking and beating, divers mortal wounds, bruises, and contusions, in and upon the head, face, breast, and other parts of the body of him the said of which said mortal wounds, bruises, and contusions, he the said on the high seas aforesaid, out of the jurisdiction of any particular state of the said United States of America, and within the jurisdiction of this court, did in-

stantly die (*or as in preceding indictment*). And so the jurors aforesaid, on their oath aforesaid, do say, that they the said in the manner and by the means last aforesaid, on the high seas, out of the jurisdiction of any particular state of the said United States of America, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, piratically, feloniously, wilfully, and of their malice aforethought, the said did kill and murder, against the peace of the said United States of America and their dignity, and against the form of the statute of the said United States in such case made and provided.

Sixth count. By drowning.

And the jurors aforesaid, on their oath aforesaid, do further present, that (*as in fifth count*), not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the day of in the year of our Lord one thousand eight hundred and with force and arms, upon the high seas, out of the jurisdiction of any particular state of the said United States, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, on board of a certain vessel being a called the owned in whole or in part by one of the a citizen of the United States of America, in and upon one in the peace of God and of the said United States, then and there being, on board of the said called the on the high seas, out of the jurisdiction of any particular state of the said United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, piratically, feloniously, wilfully, and of their malice aforethought, did take the said into their hands, he the said then and there being on the high seas, in the aforesaid, out of the jurisdiction of any particular state of the said United States, within, etc., and within the jurisdiction of this court, and did then and there feloniously, wilfully, and of their malice aforethought, cast, throw, and push the said from and out of the said called the so being on the high seas aforesaid, out of the jurisdiction of any particular state of the said United States, and within the jurisdic-

tion of this court, into the sea, by means of which said casting, throwing, and pushing of the said into the sea aforesaid, by them the said in manner and form aforesaid, he the said in the sea aforesaid, with the waters thereof, was then and there choked, suffocated, and drowned, of which said choking, suffocation, and drowning, he the said then and there in the sea aforesaid, out of the jurisdiction of any particular state of the said United States of America, within, etc., and within the jurisdiction of this court, instantly died; and so the jurors aforesaid, on their oath aforesaid, do say, that the said in the manner and by the means aforesaid, on the high seas, out of the jurisdiction of any particular state of the said United States of America, within, etc., and within the jurisdiction of this court, piratically, feloniously, wilfully, and of their malice aforethought, the said did kill and murder, against the peace and dignity of the United States of America, and against the form of the statute of the said United States in such case made and provided.

Seventh count.

(Same as last, stated differently, specifying one as principal and the others as aiding, etc.)

And the jurors aforesaid, upon their oath aforesaid, do further present, that *(as in preceding counts specified)*, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the day of in the year of our Lord one thousand eight hundred and with force and arms, on the high seas, out of the jurisdiction of any particular state of the said United States of America, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, on board of a certain vessel, being a called the owned in whole or in part by one *(specify one of the owners)* of the in the a citizen of the United States of America, in and upon one in the peace of God and of the said United States, then and there being on board the said called the on the high seas, out of the jurisdiction of any particular state of the said United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdic-

tion of this court, piratically, feloniously, wilfully, and of their malice aforethought, did make an assault; and that he the said (*here name one as principal*), then and there feloniously, wilfully, and of his malice aforethought, did take the said in his hands, he the said then and there being on the high seas, in the aforesaid, out of the jurisdiction of any particular state of the said United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and did then and there feloniously, wilfully, and of his malice aforethought, cast, throw, and push the said from and out of the said called the so being on the high seas as aforesaid, out of the jurisdiction of any particular state of the said United States of America, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, into the sea, by means of which said casting, throwing, and pushing of the said into the sea aforesaid, by him the said in manner and form aforesaid, he the said in the sea aforesaid, with the waters thereof, was then and there choked, suffocated, and drowned, of which said choking, suffocation, and drowning, he the said then and there, in the sea aforesaid, out of the jurisdiction of any particular state of the said United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, instantly died; and that the said (*here name the remaining ones*), then and there feloniously, wilfully, and of their malice aforethought, were present, aiding, helping, abetting, assisting, and maintaining the said in the felony and murder aforesaid, in manner and form aforesaid, to do and commit. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said in manner and form last aforesaid, piratically, feloniously, wilfully, and of their malice aforethought, the said did kill and murder, against the peace and dignity of the United States of America, and against the form of the statute of the said United States in such case made and provided.

Eighth count.

(Same as seventh count, substituting one other as principal.)

Ninth count.

(Same as eighth count, substituting one other as principal, if as many were engaged; and if more than three, go on as before as to each person.)

Tenth count. By wounding and drowning.

And the jurors aforesaid, on their oath aforesaid, do further present, that (as in the preceding counts specified) heretofore, to wit, on the day of in the year of our Lord one thousand eight hundred and with force and arms, upon the high seas, out of the jurisdiction of any particular state of the United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain vessel, being a called the owned by citizens of the United States of America, in and upon a person known and commonly called by the name of a mariner (or otherwise), in and on board said vessel, in the peace of God and of the said United States, then and there being, piratically, feloniously, wilfully, and of their malice aforethought, did make an assault, and that they the said with a certain instrument of called a which he the said in his hand then and there had and held, the said in and upon the head, breast, and other parts of the body of him the said upon the high seas, and on board the vessel aforesaid, and out of the jurisdiction of any particular state of the said United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, piratically, feloniously, wilfully, and of their malice aforethought, did strike and beat, giving to the said in and upon the head, breast, and other parts of the body of him the said upon the high seas, in and on board the vessel aforesaid, several grievous wounds, and did then and there, in and on board the vessel aforesaid, on the high seas aforesaid, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this

court, piratically, feloniously, wilfully, and of their malice aforethought, him the said cast and throw from and out of the said vessel into the sea, and plunge, sink, and drown him the said in the sea aforesaid, of which said grievous wounds, casting, throwing, plunging, sinking, and drowning, the said upon the high seas aforesaid, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said him the said then and there, upon the high seas as aforesaid, and out of the jurisdiction of any particular state, piratically, feloniously, wilfully and of their malice aforethought, did kill and murder, against the peace and dignity of the said United States of America, and against the form of the statute of the said United States in such case made and provided.

Eleventh count.

(Same as tenth count, inserting the name of one only of the persons engaged, as principal, with the others as accomplices, making the proper variations.)

Last count.

And the jurors aforesaid, on their oath aforesaid, do further present, that the southern district of New York (*or otherwise*), in the second circuit, is the district and circuit in which the said was first apprehended for the said offence.(x)

(177a) *Murder. By shooting on the high seas.*

The jurors of, etc., upon their oath present, that C. P., mariner, otherwise called C. W. P., late of, etc., in said district, W. H. C., mariner, otherwise called R. C., late of, etc., in said district, W. H., late of, etc., in said district, mariner, and C. H. S., mariner, otherwise called J. W. B., late of, etc., in said district, on, etc., with force and arms, on the high seas and within the admiralty and maritime jurisdiction of the said U. S., and within the jurisdiction of this court, and out of the jurisdiction

(x) See *supra*, 17, 18; *infra*, 239, note.

of any particular State of the U. S., in and on board of a certain vessel, the same then and there being a ship called J., then and there owned by D. R. G., R. B. G., D. W., and W. N., all citizens of the said U. S., in and upon one A. M., then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said U. S., and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said U. S., feloniously, wilfully, and of their malice aforethought, did make an assault ; and that the said C. P., otherwise etc., with a certain gun, called a whaling gun, then and there charged with gunpowder and three leaden bullets, which said gun he the said C. P., otherwise, etc., in both his hands then and there had and held, at and against the body of him the said A. M., then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said U. S., and within the jurisdiction, etc., and out of the jurisdiction, etc., then and there feloniously, wilfully, and of his malice aforethought, did shoot off and discharge, and that the said C. P., otherwise, etc., then and there with the three leaden bullets aforesaid, out of the gun aforesaid, then and there by force of the gunpowder aforesaid, by him the said C. P., otherwise, etc., then and there shot off, discharged, and sent forth as aforesaid, him the said A. M., then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the, etc., of the U. S., and within the jurisdiction of, etc., and out of the jurisdiction, etc., in and upon the left side of the body of him the said A. M., then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, then and there giving to him the said A. M. then and there with the three leaden bullets aforesaid, so as aforesaid, by him the said C. P., otherwise, etc., then and there shot off, discharged, and sent forth out of the gun aforesaid, by force of the gunpowder aforesaid, in, upon, and against the left side of the body of him the said A. M., and then and there penetrating into and through the body of him the said A. M., one mortal wound, of which said mortal wound the said A. M., in and on board of the ship aforesaid, and on the high seas aforesaid, and within the, etc.,

jurisdiction of the said U. S., and within the jurisdiction of, etc., and out of, etc., then and there on, etc., instantly died. And that the said W. H. C., otherwise, etc., W. H., C. H. S., otherwise, etc., then and there on, etc., in and on board of the ship aforesaid, and on the high seas aforesaid, and within, etc., and within etc., and out of, etc., feloniously, wilfully, and of their malice aforethought, were present, and then and there feloniously, wilfully, and of their malice aforethought, were aiding, abetting, comforting, assisting, and maintaining the said C. P., otherwise, etc., the felony and murder aforesaid, in the manner and form aforesaid, then and there to do, commit, and perpetrate.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. P., otherwise, etc. (here follow the other names), feloniously, wilfully, and of their malice aforethought, him the said A. M., did then and there, in the manner and form aforesaid, kill and murder, against the peace, etc.(y)

178) *Murder on the high seas, by striking with a handspike. (With commencement and conclusion as adopted in the federal courts of Pennsylvania.)(z)*

In the Circuit Court of the United States of America, in and for the Eastern District of Pennsylvania, of Sessions, in the year, etc.

Eastern District of Pennsylvania, to wit :

The grand inquest of the United States of America, inquiring for the eastern district of Pennsylvania, upon their oaths and affirmations respectively do present, that A. B., late of the district aforesaid, one of the crew of an American vessel, to wit, the bark "Active," not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil, on the day of in the year, etc., on the high seas, within the admiralty and maritime jurisdiction of the United States, to wit, at the district aforesaid, and within the

(y) It was held in this case that there was a sufficient averment that the circuit court had jurisdiction, and that the injured party was within and under the protection of the United States and in the peace thereof. *U. S. v. Plumer*, 3 Cliff. 28.

(z) *Lewis's C. L.* 644. See *U. S. v. Moran*, Phil. April Sess. 1837, where Judge Hopkins sustained a capital conviction upon an indictment possessing the same general features as the present.

jurisdiction of this court, with force and arms, in and upon one C. D., being the second mate of the said vessel, piratically, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said A. B., with a certain handspike of the value of ten cents, which he the said A. B. in both his hands then and there had and held, him the said C. D., in and upon the right side of the head of him the said C. D., did strike and beat, giving the said C. D., then and there, with the handspike aforesaid, in and upon the right side of the head of him the said C. D., one mortal wound and fracture, of the length of five inches, and of the depth of two inches, of which said mortal wound and fracture the said C. D. then and there instantly died. And so the grand inquest aforesaid, upon their oaths and affirmations aforesaid, do say, that the said A. B. the said C. D., in manner and form aforesaid, piratically, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the act of congress in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jury aforesaid, inquiring as aforesaid, upon their oaths and affirmations aforesaid, do further present, that after the commission of the said crime on the high seas, and within the jurisdiction of this court, the said A. B. was first brought, to wit, on or about the day of in the year, etc., into the said eastern district of Pennsylvania.(a)

(179) *Striking with a glass bottle on the forehead, on board an American vessel in a foreign jurisdiction. (With commencement and conclusion as adopted in the federal courts of Massachusetts.)*(b)

The jurors of the said United States within and for the said district, upon their oath present, that F. M., late of Boston, in said district, mariner, on the day of in the year, etc., in and on board of the barque "Eliza," then lying within the jurisdiction of a foreign state or sovereign, to wit, at one of the islands called the Navigators' Islands, in the South Pacific,

(a) See *supra*, 17, 18; *infra*, 239, note.

(b) This form, as well as several that will follow, was obtained through the valuable aid of F. O. Prince, Esq., of Boston.

the said barque then and there being a ship or vessel of the United States, belonging to certain citizens of the United States, whose names are to the jurors aforesaid unknown, with force and arms, in and upon one P. M., feloniously and wilfully did make an assault, and that the said F. M., with a certain glass bottle of the value of ten cents, which he the said F. M. in his right hand then and there held, him the said P. M., in and upon the head of him the said P. M., then and there feloniously and wilfully did strike, giving unto him, the said P. M., then and there, with the said glass bottle, by the stroke aforesaid, in the manner aforesaid, and upon the head of him the said P. M., one mortal wound, of the depth of one inch, and of the length of one inch, of which said mortal wound he the said P. M., on and from the day of aforesaid, until the day of on board said barque, then lying at the said island, did languish, and languishing did live; on which said day of aforesaid, the said P. M., on the high seas (the said barque having then left the said island), and within the admiralty and maritime jurisdiction of the said United States, of the said mortal wound died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said F. M. the said P. M., in manner and form aforesaid, feloniously did kill and slay, against the peace and dignity of the said United States, and contrary to the form of the statute of the United States in such case made and provided.

And the jurors aforesaid, on their oath aforesaid, do further present, that afterwards, to wit, on the day of in the year, etc., the said F. M. was first apprehended in Nantucket, in the said district of Massachusetts, which was the district in which the said F. M. was first brought after the commission of the offence aforesaid.

(180) *Against a mother for drowning her child, by throwing it from a steamboat on Long Island Sound. (Commencement and conclusion as adopted in the federal courts of Massachusetts.)*(c)

The jurors, etc., do present, that late of in the district of M., wife of of in on the day

(c) See U. S. v. Hewson, 7 Bost. L. R. 361; Wh. Cr. L. 8th ed. §§ 44, 309.

of in the waters of Long Island Sound, the same being an arm of the sea, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, in and on board of the steamer "M.," the same then and there being an American ship or vessel, in and upon the female child of her the said the said female child then and there being an infant of tender age, to wit, about the age of three weeks, whose name is as yet unknown to the jurors aforesaid, feloniously, wilfully, and of her malice aforethought, did make an assault, and that the said then and there, feloniously, wilfully, and of her malice aforethought, did take the said female child into both the hands of her the said and did then and there feloniously, wilfully, and of her malice aforethought, cast and throw the said female child from on board the said steamer "M." into the waters of the said Long Island Sound, by reason of which casting and throwing of the said female child into the waters aforesaid, the said female child, in the said Long Island Sound, by the waters aforesaid, was then and there choked, suffocated, and drowned, of which said choking, suffocating, and drowning, the said female child then and there instantly died. And the jurors aforesaid, on their oath aforesaid, do say, that the said the said female child, in the said arm of the sea, within the admiralty and maritime jurisdiction of the United States, and without the jurisdiction of any particular state, in the manner and by the means aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder, against the peace and dignity of the said United States, and contrary to the form, etc.

Second count.

(Omitting averment of relationship, and charging the sex to be unknown.)

And the jurors, etc., further present, that late of in the district of M., wife of of in on the day of in the waters of the Long Island Sound, the same being an arm of the sea, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, in and on board of the steamer "M.," the same then and there being an American ship or ves-

sel, in and upon a certain child, the said child then and there being an infant of tender age, to wit, under the age of one year, whose name and sex are unknown to the jurors aforesaid, feloniously, wilfully, and of her malice aforethought, did make an assault; and that the said then and there feloniously, wilfully, and of her malice aforethought, did take the said child into both the hands of her the said and did then and there feloniously, wilfully, and of her malice aforethought, cast and throw the said child from on board the said steamer "M." into the waters of said Long Island Sound, by reason of which casting and throwing of the said child into the waters aforesaid, the said child, in the said Long Island Sound, by the waters aforesaid, was then and there choked, suffocated, and drowned, of which said choking, suffocating, and drowning, the said child then and there instantly died. And the jurors aforesaid, on their oath aforesaid, do say, that the said the said child on the said arm of the sea, within the admiralty and maritime jurisdiction of the United States, and without the jurisdiction of any particular state, in the manner and by the means aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder, against the peace and dignity of the said United States, and contrary to the form, etc.

And the jurors, etc., on, etc., further present, that afterwards, to wit, on the said the said was first apprehended at in said District of Massachusetts, and that, etc.(d)

(181) *Murder on the high seas, with a hatchet.*(e)

Southern District of New York, ss. The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present, that of the city and county of New York, in the district and circuit aforesaid, mariner, of the said city and county, mariner, and of the said city and county, mariner, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the day of in the year, etc., with force and arms, upon the high seas, out of the jurisdiction of any partic-

(d) See *supra*, 17, 18; *infra*, 239, note.

(e) On this indictment the defendants were convicted in the circuit court for the southern district of New York in *U. S. v. Wilhelm et al.*

ular state of the said United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, on board of a certain vessel, being a called the owned by a certain person or persons whose names are to the said jurors unknown, then being a citizen or citizens of the United States of America, in and upon one in the peace of God and of the said United States, then and there being, on board the said called the on the high seas, out of the jurisdiction of any particular state, and within the jurisdiction of this court, piratically, feloniously, wilfully, and of their malice aforethought, did make an assault; and that the said with a certain instrument of wood and iron called a hatchet (*or other instrument*), of the value of which the said in his hand then and there had and held, the said in and upon the head, face, breast, and other parts of the body of him the said then and there being, on the high seas, in the aforesaid, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, then and there feloniously, wilfully, and of his malice aforethought, did strike, giving to the said then and there, with the aforesaid, by such striking with the aforesaid, in manner aforesaid, in and upon the head, face, breast, and other parts of the body of him the said several mortal strokes, wounds, and bruises, to wit, one mortal wound on of him the said of the length of inches, and of the depth of inches, one mortal wound on the of him the said of the length of inches, and of the depth of inches, and one mortal wound on the of him the said of the length of inches, and of the depth of inches, of which said mortal wounds the said from the said day of in the year aforesaid, until the day of the same month (*or otherwise*) of in the year aforesaid, on the high seas aforesaid, out of the jurisdiction of any particular state, and within the jurisdiction of this court, did languish, and languishing did live; on which said day of in the year aforesaid, the said on the high seas aforesaid, out of the jurisdiction of any particular state, and within the jurisdiction of this court, of the said mortal wounds, died. And that the said and then and there feloniously

ously, wilfully, and of their malice aforethought, were present aiding, abetting, comforting, assisting, and maintaining the said in the felony and murder aforesaid, in manner and form aforesaid, to do and commit, and so the jurors aforesaid, upon their oath aforesaid, do say, that the said (*here insert the names of all*) in manner and form aforesaid, piratically, feloniously, wilfully, and of their malice aforethought, the said did kill and murder, against the peace and dignity of the United States of America, and the form of the statute of the said United States in such case made and provided.

Second count.

(*Same as preceding count, inserting the name of one other as principal ; and also, instead of "being a called the owned by a certain person or persons, whose names are to the said jurors unknown, then being a citizen or citizens of the United States of America," insert "being a called the owned by citizens (or a citizen) of the United States of America."*)

Third count.

(*Same as preceding count, inserting the name of one other person as principal if as many as three were engaged.*)

Fourth count.

And the jurors aforesaid, on their oath aforesaid, do further present, that of the city and county of New York, in the district and circuit aforesaid, mariner, of the said city and county, in the district and circuit aforesaid, mariner, and of the said city and county, in the district and circuit aforesaid, mariner (*if as many are specified in the complaint*), not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the day of in the year, etc., with force and arms, upon the high seas, out of the jurisdiction of any particular state of the said United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, on board of a certain vessel being a called the owned by citizens (*or a citizen*) of the United States of America, in and

upon one in the peace of God and the said United States, then and there being, on board the said called the on the high seas, out of the jurisdiction of any particular state, within the admiralty and maritime jurisdiction of the said United States of America, and within the jurisdiction of this court, piratically, feloniously, wilfully, and of their malice aforethought, did make an assault, and that the said (specify one), with a certain instrument of called a of the value of which he the said then and there in his hand had and held, and the said (specify another), with a certain other instrument of called a of the value of which he the said in his hand then and there had and held, and the said (specify another if as many as three were engaged), with a certain instrument of of the value of which he the said in his hand then and there had and held, the said in and upon the head, face, breast, and other parts of the body of him the said then and there being on the high seas, in the afore-said, out of the jurisdiction of any particular state, and within the jurisdiction of this court, then and there, feloniously, wilfully, and of their malice aforethought, did strike, giving to the said then and there, with the aforesaid, by such striking, with the aforesaid, in manner aforesaid, in and upon the head, face, breast, and other parts of the body of him the said several mortal strokes and wounds, to wit, one mortal stroke and wound on the of him the said of the length of inches, and of the depth of inches, one mortal stroke and wound on the of him the said of the length of inches, and of the depth of inches, one mortal stroke and wound on the side of the breast of him the said of the length of inches, and of the depth of inches, and one other mortal stroke and wound on the of him the said of the length of inches, and of the depth of inches, of which said mortal strokes and wounds the said from the said day of in the year, etc., on the high seas aforesaid, out of the jurisdiction of any particular state, and within the jurisdiction of this court, did languish, and languishing did live, until the day of the same month (or otherwise) of in the year last aforesaid, on which said

day of in the year last aforesaid, the said on the high seas aforesaid, out of the jurisdiction of any particular state, and within the jurisdiction of this court, of the said mortal strokes and wounds died.

And the jurors aforesaid, on their oath aforesaid, do say, that they the said him the said in the manner and by the means last aforesaid, on the high seas, out of the jurisdiction of any particular state, and within the jurisdiction of this court, piratically, feloniously, wilfully, and of their malice aforethought, the said did kill and murder, against, etc., and against, etc.

Final count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the southern district of New York, in the second circuit aforesaid, is the district and circuit in which the said offenders, viz. the said were first brought and apprehended for the said offences.(f)

(182) *Manslaughter on the high seas.(g)*

First count. Drowning, etc., on a vessel whose name was unknown, etc.

The grand inquest of the United States of America, inquiring

(f) As a matter of course, where the party or parties have not been arrested, but where the indictment is drawn for the purpose of issuing a bench warrant, the count in conclusion is not to be put in. Where an offence has been committed against the laws of the United States of America, under the admiralty and maritime jurisdiction, in or near a foreign port or place, in and on board of a vessel belonging in whole or in part to a citizen or citizens of the United States of America (see act of Congress of March 3d, 1825, § 5), the indictment should, after beginning in the usual way, proceed thus: on the high seas, near, etc., or, at a port or place within the jurisdiction of a foreign state or sovereign, to wit (name distinctly the port or place, and the state or sovereign under whose jurisdiction it is), on waters out of the jurisdiction of any particular state of the said United States of America, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the belonging in whole or in part to a certain person or persons, whose name or names are to the said jurors unknown, then and still being a citizen or citizens of the said United States of America, etc.

(g) U. S. v. Holmes, 1 Wall. Jr. 1. The defendant was convicted under this indictment, and was sentenced to a small punishment, but was afterwards pardoned by the President. The case was of great singularity, involving the question, whether a mariner in a case of extreme necessity, is justified in throwing overboard a passenger from a boat unable to hold the two. See Wh. Cr. L. 8th ed. §§ 511, 1869.

in and for the eastern district of Pennsylvania, on their oaths and affirmations respectively, do present, that A. W. H., late of the district aforesaid, mariner, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the day of in the year, etc., upon the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, on board of a certain vessel, to wit, a vessel the name whereof is to the jurors unknown, then and there belonging to a citizen of the United States, to wit, one J. P. V., late of the district aforesaid, with force and arms, in and upon a person known and commonly called by the name of F. A., in and on board of said vessel, in the peace of God and of the United States, then and there being, unlawfully and feloniously did make an assault; and that he the said A. W. H., then and there on board of the said vessel, upon the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, with force and arms, unlawfully and feloniously did cast and throw the said F. A. from and out of the said vessel into the high seas there, by means of which said casting and throwing of him the said F. A. from and out of the said vessel into the high seas aforesaid, he the said F. A., in and with the water thereof, upon the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, then and there was suffocated and drowned, of which said suffocation and drowning he the said F. A. did then and there instantly die. And so the grand inquest aforesaid, inquiring as aforesaid, on their oaths and affirmations aforesaid, do say, that the said A. W. H. him the said F. A., in the manner and by the means aforesaid, unlawfully and feloniously did kill, contrary, etc., and against, etc.

Second count. Same on a long-boat belonging to J. P. V., etc.

And the grand inquest aforesaid, inquiring as aforesaid, on their oaths and affirmations aforesaid, do further present, that afterwards, to wit, on the day and year aforesaid, the said A.

W. H., not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, upon the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, on board of a certain vessel, to wit, the long-boat of the ship "W. B.," then and there belonging to a citizen of the United States, to wit, one J. P. V., late of the district aforesaid, with force and arms, in and upon a person known and commonly called by the name of F. A., in and on board of said vessel, in the peace of God and of the United States, then and there being, unlawfully and feloniously did make an assault; and that he the said A. W. H. then and there, on board of the said vessel upon the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, with force and arms, unlawfully and feloniously did cast and throw the said F. A. from and out of the said vessel into the high seas, by means of which said casting and throwing of him the said F. A., from and out of the said vessel into the high seas aforesaid, he the said F. A., in and with the waters thereof, upon the high seas aforesaid, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, then and there was suffocated and drowned, of which said suffocation and drowning he the said F. A. did then and there instantly die. And so, etc. (*as in first count*).

Final count.

And the grand inquest aforesaid, inquiring as aforesaid, on their oaths and affirmations aforesaid, do further present, that after the commission of the crimes so as aforesaid committed on the high seas, and out of the jurisdiction of any particular state, to wit, on the day of the said A. W. H., the offender aforesaid, was apprehended in the eastern district of Pennsylvania.^(h)

(h) See *supra*, 17, 18; *infra*, 239, note.

(193) *Misdemeanor in concealing death of bastard child by casting it in a well, under the Pennsylvania statute.*(i)

And the inquest aforesaid, on their oaths and affirmations aforesaid, do further present, that the said R. P., on the said day of in the year aforesaid, being big with a male

(i) See generally under this head, Wh. Cr. L. 8th ed. §§ 600 *et seq.*

It is not necessary in Pennsylvania to set forth in what manner or by what arts the mother endeavored to conceal the death of the child. *Boyle v. Com.*, 2 S. & R. 40. It is a fatal objection that an indictment for concealing the death does not directly aver the death of the child. It is not sufficient to aver that the defendant "did endeavor privately to conceal the death of the said female bastard child." *Douglas v. Com.*, 8 Watts, 535; *Com. v. Clark*, 2 Ash. 105. Whether the child be born dead or alive would seem to be immaterial. *Douglas v. Com.*, 8 Watts, 535, *Rogers, J.* See *R. v. Coxhead*, 1 C. & K. 623. The concealment is not conclusive evidence of the fact, unless the circumstances attending it are sufficient to satisfy the jury that the mother did wilfully and maliciously destroy the child. *Penn. v. M'Kee*, Add. 2.

Under the North Carolina act against the mother, for concealing the birth of her bastard child, it is said that it is not incumbent on the prosecution to show that the child was born alive, but the burden of showing the contrary is on the part of the accused (see *R. v. Douglas*, 1 Mood. C. C. 462); and that the *corpus delicti* is concealing the death of a being upon whom the crime of murder would have been committed; and, therefore, if the child be born dead, concealment is not an offence against the statute. *State v. Joiner*, 4 Hawks, 350. A mother having caused the body of her child to be buried privately, her object being to conceal its birth, it was held, under the stat. 43 Geo. III. c. 58, and 9 Geo. IV. c. 31, s. 14, from which the American acts differ but little, that the fact of her having previously acknowledged the birth to several persons, did not prevent her conviction of the concealment. *R. v. Douglas*, 1 Mood. C. C. 462. Where the woman was delivered of a child, the dead body of which was found in a bed amongst the feathers, but there was no evidence to show who put it there, and it appeared that the mother had sent for a surgeon at the time of her confinement, and had prepared child's clothes, the judge directed an acquittal of the charge for endeavoring to conceal the birth. *R. v. Higley*, 4 C. & P. 366. Where a woman delivered of a seven months' child, threw it down the privy, and it appeared that another woman, charged as an accomplice, knew of the birth; upon an indictment for murder against the two, the jury found the mother guilty of the concealment; and the point being saved upon a doubt, whether it was a case within the stat. 43 Geo. III. c. 58, as a second person knew of the birth, the judges held that the act of throwing the child down the privy was evidence of the endeavor to conceal the birth, and that the conviction was right. *R. v. Cornwall*, R. & R. 336. An indictment on stat. 9 Geo. IV. c. 31, s. 14, for endeavoring to conceal the birth of a dead child, need not state whether the child died before, at, or after its birth. *Reg. v. Coxhead*, 1 C. & K. 623. An indictment which charged that the defendant did cast and throw the dead body of the child into soil in a certain privy, "and did thereby, then and there, unlawfully dispose of the dead body of the said child, and endeavor to conceal the birth thereof," sufficiently charges the endeavor to conceal the birth, as the word "thereby" applies to the endeavor, as well as to the disposing of the dead body. *R. v. Douglas*, 1 Mood. C. C. 462.

By the act of 22d April, 1794 (*Purd.* 532), the grand jury may join a count for murder with a count for concealment. For other forms in such cases, see *supra*, 157-159.

child, the same day and year, in the county aforesaid, by the providence of God did bring forth the said child of the body of her the said R., alone and in secret,(j) which said male child if it were born alive would by the laws of this commonwealth be a bastard; and that the said R. afterwards, to wit, on the day of in the year aforesaid, as soon as the said male child was born, did endeavor privately to conceal the death of the said child,(k) and did take the said child into both the hands of her the said R., and did then and there wilfully and privately cast and throw the said child into and down the well of a certain privy there situate, so that it might not come to light, whether the said child was born dead or alive, or whether it were murdered or not, contrary, etc., and against, etc.

(184) *Same where means of concealment are not stated.*(l)

That J. B., late of the county aforesaid, spinster, on, etc., at, etc., b. ing big with a certain female infant, the same day and year, at the county aforesaid, did bring forth the said infant of the body of her the said J. B., alone and in secret, which same infant, so being brought forth alive, was by the laws of this commonwealth a bastard; and that the said J. B. afterwards, to wit, the same day and year aforesaid (the said female infant having on the day and year last aforesaid, at the township and county aforesaid, died), did endeavor privately to conceal the death of the said female infant, so that it might not come to light whether the said female infant was born dead or alive, or whether the said female infant was murdered or not, contrary, etc., and against, etc.

(184a) *Form used in Philadelphia in 1880.*

First count.

That late of the said county on the day
of in the year of our Lord one thousand eight hundred
and at the county aforesaid, and within the juris-

(j) The facts must be specially stated. *Foster v. Com.*, 12 Bush, 373.

(k) The time of death need not be stated. *R. v. Coxhead*, 1 C. & K. 623.

(l) See *Boyle v. Com.*, 2 S. & R. 40, where this count was sustained. The usual form, however, is to charge the object of the offence as a "child," and not an "infant," and I would add another count so stating it, notwithstanding the sanction by the supreme court of the form in the text.

diction of this court, with force and arms, etc., being big and pregnant with a certain child, afterwards, to wit, on the said day of in the year aforesaid, at the county aforesaid, and within the jurisdiction of this court, did bring forth of the body of her the said the said child alive, which said child by the laws of the commonwealth of Pennsylvania aforesaid, then and there was a bastard.

And the grand inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that afterwards, to wit, on the said day of in the year aforesaid, at the county aforesaid, and within the jurisdiction of this court, the said bastard child so brought forth of the body of the said as aforesaid, did die.

And the grand inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said afterwards, to wit, on the said day of in the year aforesaid, at the county aforesaid, and within the jurisdiction of this court, the bastard child aforesaid, so brought forth of the body of her the said as aforesaid, and dead as aforesaid, did then and there unlawfully and wilfully conceal, and did then and there unlawfully and wilfully conceal the death of the said bastard child, so that it might not come to light whether the said bastard child had been born dead or alive, or whether the said bastard child was murdered or not, contrary, etc.

Second count.

And the grand inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said on the said day of in the year of our Lord one thousand eight hundred and at the county aforesaid, and within the jurisdiction of this court, being big and pregnant with a certain child, on the said day of in the year aforesaid, at the county aforesaid, and within the jurisdiction of this court, did bring forth the said child of the body of her the said which said child theretofore died in the womb of her the said and being so brought forth as aforesaid, then and there was dead; and which said

child if born alive, by the laws of the commonwealth of Pennsylvania aforesaid, would then and there be a bastard.

And the grand inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said afterwards, to wit, on the said day of in the year aforesaid, at the county aforesaid, and within the jurisdiction of this court, the bastard child aforesaid, so brought forth of the body of her the said as aforesaid, and dead as aforesaid, did unlawfully and wilfully conceal, and did then and there unlawfully and wilfully conceal the death of the bastard child aforesaid, so that it might not come to light whether the said bastard child was born dead or alive, or whether the said bastard child was murdered or not, contrary, etc. *(m)*

(185) *Endeavor to conceal the birth of dead child under the English statute.* *(n)*

That A. C., late of, etc., on, etc., at, etc., being big with a certain female child, afterwards, to wit, on the same day, and in the year aforesaid, in the parish aforesaid, in the county aforesaid, of the said child was delivered.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. C. afterwards, to wit, on the same day, and in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, with both her hands, unlawfully did cast and throw the dead body of the said child into and amongst the soil, waters, and filth then being in a certain privy there, and did thereby then and there unlawfully dispose of the dead body of the said child, and endeavor to conceal the birth thereof, against, etc., and against, etc.

(m) For this form I am indebted to W. W. Kerr, Esq., formerly assistant district attorney in Philadelphia.

(n) *R. v. Coxhead*, 1 C. & K. 623.

CHAPTER II.

RAPE. (a)

(186) General form.

(187) For carnally knowing and abusing a woman child under the age of ten years. Mass. stat. 1852, ch. 259, § 2.

(188) Rape. Upon a female other than a daughter or a sister of the defendant, under Ohio stat. p. 48, § 2.

(189) Rape. Upon a daughter or sister of the defendant, under Ohio stat. p. 48, § 1.

(190) Rape. Abusing female child with her consent, under Ohio stat. p. 48, § 2.

(190a) Rape under Indiana statute.

(190b) Another form.

(190c) Procuring defilement under English statute.

[For assaults with intent to ravish, see 253, etc.]

(186) *General form.*

That I. S., (b) late of the parish of B., in the county of M., laborer, (c) on the day of etc., with force and arms, (d) at the parish aforesaid, in the county aforesaid, in and upon one

(a) See Wh. Cr. L. 8th ed. § 550 *et seq.*

(b) Two defendants may be joined as principals, *supra*, notes to form 97. *R. v. Burgess*, 1 Russ. on Cr. 687; *Strong v. People*, 24 Mich. 1. An indictment charging, in one count, G. as principal in the first degree and W. as present aiding and abetting, and in another count W. as principal in the first degree and G. as aiding and abetting, was sustained in *R. v. Gray*, 7 C. & P. 164. Wh. Cr. L. 8th ed. § 569.

A general conviction of defendant, charged both as principal in the first degree, and as an aider and abettor of other men in rape, is valid on the count charging him as principal. And on such an indictment, evidence may be given of several rapes on the same woman. at the same time, by the defendant and other men, each assisting the other in turn, without putting the prosecutor to elect on which count to proceed. *R. v. Folkes*, 1 Mood. C. C. 344.

An indictment is good which charges that A. committed a rape, and that B. was present aiding and abetting him in the commission of the felony; for the party aiding may be charged either as he was in law, a principal in the first degree, or as he was in fact, a principal in the second degree. *R. v. Crisham*, C. & M. 187.

(c) Age need not be stated, so as to exclude impuberty. *Com. v. Sugland*, 4 Gray, 7; *People v. Ah Yek*, 29 Cal. 575.

(d) These words are surplusage. *Supra*, note to form 2, p. 17.

A. N.,(c) in the peace of God and the said state, then and there being, violently and feloniously did make an assault,(f) and her the said A. N., then and there forcibly and against her will,(g) feloniously did ravish(h) and carnally know,(i) against, etc. (*Conclude as in book 1, chapter 3. Add a count for assault and intent to ravish.*)(j)

(187) *For carnally knowing and abusing a woman child under the age of ten years.*(k)

The jurors, etc., upon their oath present, that C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F., a woman child, under the age of ten years, to wit, of the age of nine years, feloniously did make an assault, and her the said E. F. then and there feloniously did unlawfully and carnally know and abuse, against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.

(e) It is not necessary to aver that the prosecutrix was a woman (*Com. v. Sullivan*, 6 Gray, 477; *Com. v. Fogerty*, 8 Gray, 489; *State v. Farmer*, 4 Fred. 224); nor need her age be given (*Ib.*; *Com. v. Scannel*, 11 Cush. 547; *State v. Storkey*, 63 N. C. 7), unless the object be to prosecute under a distinct statute, of which age is the ingredient, as is the case with statutes making peculiarly penal offences against infant children. *Infra*, 190; *R. v. Martin*, 9 C. & P. 215. As to Ohio statute, see *O'Meara v. State*, 17 Ohio St. 515. The averment of age may be rejected as surplusage. *Mobley v. State*, 46 Miss. 501.

(f) An indictment charging that the defendant in and upon A. B. "feloniously and violently did make (omitting the words 'an assault'), and her the said A. B. then and there, against her will, violently and feloniously did ravish and carnally know," etc., was held sufficient in arrest of judgment. *R. v. Allen*, 1 Mood. C. C. 179; 9 C. & P. 521; *O'Connell v. State*, 6 Minn. 279. There can be no conviction of assault, however, on such an indictment.

(g) Though these words used to be considered essential (*Wh. Cr. Pl. & Pr.* § 263; *State v. Jim*, 1 Dev. 142), yet it has been held that the clause might be supplied by "feloniously did ravish and carnally know her." *Harman v. Com.*, 12 S. & R. 69; *Com. v. Bennett*, 2 Va. Cases, 235; *Wh. Cr. L.* 8th ed. § 573.

(h) "Ravish" is essential. *Gogleman v. People*, 3 Park. C. R. 15; *Christian v. Com.*, 23 Grat. 954; *Davis v. State*, 42 Tex. 226.

"Unlawfully" may be dispensed with. *Weinzorpfli v. State*, 7 Blackf. 186.

(i) The omission of the "*carnaliter cognovit*" makes the indictment bad on demurrer, but, as it seems, not after verdict, under the late English statute of jeofails. *R. v. Warren*, 1 Russ. 686.

(j) See closing notes to form 2, p. 31, as to the propriety of such a joinder; and see also *Wh. Cr. L.* 8th ed. § 570; *Wh. Cr. Pl. & Pr.* §§ 285-90.

(k) *Tr. & H. Pree*; *Mass. St.* 1852, ch. 259, § 2.

- (188) *Rape upon a female other than a daughter or sister of the defendant, under Ohio stat. p. 48, § 2.*

That A. B., on the _____ day of _____ in the year of our Lord one thousand eight hundred and forty-nine, in the county of Cuyahoga aforesaid, in and upon M. N., then and there being, unlawfully, violently, and feloniously did make an assault, and her the said M. N. then and there forcibly and against her will, feloniously did ravish and carnally know, she the said M. N. then and there not being the daughter or sister of the said A. B., contrary, etc. (*Conclude as in book 1, chapter 3.*)

- (189) *Rape upon a daughter or sister of the defendant, under Ohio stat. p. 48, § 1.*

That A. B., on the _____ day of _____ in the year of our Lord one thousand eight hundred and _____ in the county of _____ aforesaid, in and upon one M. N., then and there being, unlawfully, violently, and feloniously did make an assault, and her the said M. N., then and there forcibly and against her will, feloniously did ravish and carnally know, she the said M. N. then and there being the daughter (*or sister, as the case may be*) of the said A. B., and the said A. B. then and there well knowing the said M. N. to be his daughter (*or sister*), contrary, etc. (*Conclude as in book 1, chapter 3.*)

- (190) *Rape. Abusing female child with her consent, under Ohio stat. p. 48, § 2.*

That A. B., on the _____ day of _____ in the year of our Lord one thousand eight hundred and _____ in the county of _____ aforesaid, being then and there a male person of the age of seventeen years and upward, in and upon one M. N., a female child,^(l) under the age of ten years, to wit, of the age of eight years, then and there being, unlawfully, forcibly, and feloniously did make an assault, and her the said M. N. then and there unlawfully and feloniously did carnally know and abuse, with her consent, contrary, etc. (*Conclude as in book 1, chapter 3.*)(*m*)

(l) That this is required under statute see *O'Meara v. State*, 17 Oh. St. 515. The qualification may be rejected as surplusage. *Mobley v. State*, 46 Miss. 501.

(m) *Warren C. L.* 68.

(190a) *Rape under Indiana statute.*

Indictment for rape, alleging that the defendant, "on, etc., at, etc., did then and there, in and upon A. V., a woman, forcibly and feloniously make an assault; and her the said A. V., then and there, unlawfully, forcibly, and against her will, feloniously ravish and carnally know, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of," etc.(n)

(190b) *Another form.*

"The grand jury, etc., on their oath do present and charge, that A. V., late of said county, on, etc., at, etc., did then and there unlawfully, in and upon D. W., a woman, forcibly and feloniously make an assault, and her, the said D. W., then and there, unlawfully, forcibly, and against her will, feloniously ravish and carnally know, contrary," etc.(o)

(190c) *Procuring defilement of girl under English statute.*

That I. S., etc., on, etc., at, etc., by falsely pretending and representing unto one I. N. that (*here set out the false pretences or representations*) did procure I. N. to have illicit carnal connection with a certain man, named (*or to the jurors aforesaid unknown*), she, the said I. N., at the time of such procurement, being then a woman under the age of twenty-one years, to wit, of the age of ; whereas, in truth and fact (*negating the pretences or representations*), against, etc.(p)

(n) It was held in Indiana that this indictment was not bad because the word "did" was not repeated before the words "ravish and carnally know." *Whitney v. State*, 35 Ind. 503.

(o) Sustained in *Vance v. State*, 65 Ind. 460.

(p) Arch. C. P. 19th ed. p. 767.

CHAPTER III.

SODOMY.(a)

(191) General form.

(191a) Under Pennsylvania statute.

(191) *General form.*

That A. B., on, etc., at, etc., in and upon T. L., then and there being, feloniously did make an assault, and then and there feloniously, wickedly, diabolically, and against the order of nature, had a venereal affair (b) with the said T. L., and then and there carnally knew the said T. L., and then and there feloniously, wickedly, and diabolically, and against the order of nature, with the said T. L. did commit and perpetrate that detestable and abominable crime of buggery (c) (not to be named among Christians), to the great displeasure of Almighty God, to the great scandal of all human kind, against, etc. (*Conclude as in book 1, chapter 3.*)

(191a) *Under Pennsylvania statute.*

That A. B., late of the said county on the day of in the year of our Lord one thousand eight hundred and eighty- at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., feloniously, wilfully, wickedly, and against the order of nature, did have a certain venereal affair and carnal intercourse and copulation with and between him the said A. B. and one L. R., and then and there, feloniously, wilfully, wickedly, indecently, and against the

(a) Stark. C. P. 434. See Wh. Cr. L. 8th ed. § 579.

(b) "Had a venereal affair" is not essential. *Lambertson v. People*, 5 Parker, C. C. 200.(c) This word is essential. Co. Ent. 350; Fost. 424; Wh. Cr. L. 8th ed. § 580, etc. That "commit sodomitical practices" is insufficient, see *R. v. Rowed*, 2 G. & D. 518; 3 Q. B. 180; *Davis v. State*, 3 H. & J. 154. That specification is required, see *State v. Campbell*, 29 Tex. 44. For letter soliciting, see 1060a.

(191a)

OFFENCES AGAINST THE PERSON.

order of nature, did insert the person and private parts of him the said A. B. into the of him the said L. R. (*or*, did suffer and permit the said L. R. then and there to insert the person and private parts of him the said L. R. into the of him the said A. B.), and did then and there, in manner and form aforesaid, commit the crime of sodomy and buggery with the said L. R., contrary, etc. (*d*)

(*d*) For this form I am indebted (1881) to Wm. W. Ker, Esq., formerly assistant district attorney of Philadelphia.

CHAPTER IV.

MAYHEM. (a)

- (192) Indictment on Coventry Act, 22 and 23 Car. II. c. 1, for felony, by slitting a nose, and against the aider and abettor.
- (193) Mayhem by slitting the nose, under the Rev. Stat. Massachusetts, ch. 125, § 10.
- (194) Mayhem by cutting out one of the testicles, under the Pennsylvania statute.
- (195) Against principal in first and second degree for mayhem in biting off an ear, under the statute of Alabama.
- (196) Biting off an ear, under Rev. Stat. N. C. ch. 34, § 48.
- (197) Maliciously breaking prosecutor's arm with intent to maim him, under the Alabama statute.
- (192) *Indictment on Coventry Act, 22 and 23 Car. II. ch. 1, for felony, by slitting a nose, and against the aider and abettor.* (b)

That J. W., late of, etc., laborer, and A. C., late of, etc., Esq., on, etc., contriving and intending one E. C. to maim and disfigure, (c) at, etc., with force and arms, in and upon the said E. C., in the peace of God and the said state, then and there being, on purpose, (d) and on (or "of their") malice aforethought, (d) and by lying in wait, unlawfully and feloniously (e) did make an assault, and the said J. W., with a certain iron bill of the value of one penny, which he the said J. W. in his right hand then and there had and held, (f) the nose of the said E. C., on purpose, and of his malice aforethought, and by lying in wait, then and there

(a) See Wh. Cr. L. 8th ed. § 581.

(b) Chit. C. L. vol. 3, 786. Though mayhem is still an offence at common law, and as such is the subject of prosecutions in England, there are few precedents of indictments for it as a common law offence. This form was taken by Mr. Chitty (3 C. L. 786) from the Cro. C. C. 264. In most of our states, however, so far as the ground is unoccupied by statute, the common law remedy remains, and mayhem may still be treated as a common law offence.

(c) The intent as thus laid is necessary. 1 East, P. C. 402.

(d) The omission of these words would be unsafe. 1 East, P. C. 402; Penn. v. M'Birnie, Add. R. 28.

(e) This is requisite. Hawk. b. 2, c. 23, s. 18; Chit. C. L. 786, 787. See *infra*, note (g).

(f) The same precision is necessary as in murder. Hawk. b. 2, c. 23, s. 79.

unlawfully and feloniously(*g*) did slit,*(h)* with intention the said E. C., in so doing, in manner aforesaid, to maim and disfigure;*(i)* and that the aforesaid A. C., at the time the aforesaid felony by the said J. W., in manner and form aforesaid, was done and committed, to wit, on the said, etc., at, etc., with force and arms, on purpose, and of his malice aforethought, and by lying in wait, unlawfully and feloniously was present (*knowing of and privy to the said felony*),*(j)* aiding and abetting the said J. W. in the felony aforesaid, in manner and form aforesaid done and committed. And so the jurors, etc., do say,*(k)* that the said J. W. and A. C., on the said, etc., at, etc., aforesaid, with force and arms, on purpose, and of their malice aforethought, and by lying in wait, the felony aforesaid, in form aforesaid, unlawfully and feloniously did do and commit, and each of them did do and commit, against, etc., and against, etc.

(193) *Mayhem by slitting the nose, under Rev. Stat. Mass. ch. 125, § 10.*

That C. D., late of B. in the county of S., laborer, on the first day of June, in the year of our Lord with force and arms, at B. aforesaid, in the county aforesaid, the said C. D. being then and there armed with a certain dangerous weapon, to wit, a knife, with malicious intent the said J. N. then and there to

(*g*) In England, 3 Chit. C. L. 786, and in Pennsylvania, the practice is to charge the offence as a felony; but in Massachusetts, Georgia, and Alabama, it is treated as a misdemeanor. See Wh. Cr. L. 8th ed. § 583, for authorities.

"Every indictment for maiming," says Mr. Chitty (3 C. L. 787), "though at common law, must charge the offence to have been done *feloniously*, because the defendant was formerly punished with loss of member." Hawk. b. 2, c. 23, s. 18. The term *maheimavit* was always essential formerly, as the word *maim* is at present. Ib. s. 17; Com. v. Newell, 7 Mass. 245. The wound should be set forth with the same degree of precision as in cases of murder; and a similar conclusion must be drawn, that *so* the defendant did *feloniously maim*, etc., though this will not supply the omission of either of these words in the previous description of the violence. 1 East, P. C. 402. In case of indictment on the statute of Charles, its language must be accurately followed; so that the expressions *on purpose, of malice aforethought, and by lying in wait*, as well as the allegation that the act was done *with intent to maim and disfigure*, are material. Ib.; Penn. v. M'Birnie, Add. R. 28.

(*h*) The wound should be laid with the same precision as in murder. 3 Chit. C. L. 786.

(*i*) In New York the indictment must aver a premeditated design. Tully v. People, 67 N. Y. 15.

(*j*) The words of the statute.

(*k*) This conclusion is necessary. 1 East, P. C. 402; 3 Chit. C. L. 786, 787.

maim and disfigure, in and upon the said J. N. feloniously did make an assault; and that the said C. D., with the said knife, the nose of the said J. N. then and there feloniously and maliciously did cut and slit, with malicious intent then and there and thereby, in manner aforesaid, the said J. N. then and there, to maim and disfigure; against, etc., and contrary, etc.(l) (*Conclude as in book 1, ch. 3.*)

(194) *Mayhem by cutting out one of the testicles, under the Pennsylvania statute.*(m)

That negro T., late of the said county, yeoman, on the second day of May, A. D. one thousand eight hundred and six, at the county aforesaid, and within the jurisdiction of this court, contriving and intending one T. W. to maim and disfigure, with force and arms, in and upon the said T. W., in the peace of God and the commonwealth, then and there being, feloniously, voluntarily, and maliciously did make an assault; and the said negro T., with a certain knife of the value of ten cents, which he the said negro T. in his right hand then and there had and held, on purpose, and of his malice aforethought, then and there, unlawfully, voluntarily, maliciously, and feloniously did cut out, mutilate, and destroy one of the testicles, to wit, the left testicle of him the said T. W., with intention him the said T. W., in so doing, in manner aforesaid, to maim and disfigure; and so the jurors aforesaid, upon their oaths, etc., aforesaid, do say, that the said negro T., on the said day of in the year aforesaid, at the county aforesaid, with force and arms, on purpose, and of his malice aforethought, the offence aforesaid in manner and form aforesaid, did do and commit, contrary, etc., and against, etc.(n)

(l) Tr. & H. Prec. 385. See *Com. v. Newell*, 7 Mass. 245.

(m) The defendant was convicted in 1806, under this indictment, in the Philadelphia quarter sessions.

(n) In an early indictment in Pennsylvania (*Resp. v. Langecake*, 1 Yeates, 415), the first count stated, that Langecake, contriving and intending Jonathan Carmalt, a citizen of Pennsylvania, to maim and disfigure, with force and arms, etc., on purpose and of his malice aforethought, *and by lying in wait*, on the 13th August, 1794, at, etc., unlawfully and feloniously did make an assault on the said Jonathan with a cart-whip, of the value of 1s., and the right eye of the said Jonathan then and there did strike and put out, with an intent in so doing to maim and disfigure him, against the act of assembly, etc., and that Hook was then and there present, aiding and abetting the fact, etc., against the act, etc.

The second count was grounded on the latter part of the 6th section of the

(195) *Against principal in first and second degree for mayhem in biting off an ear under the statute of Alabama.*(o)

That W. M., on, etc., at, etc., in and upon one W. E. W., in the peace of the said state, then and there being, did make an

act of 22d April, 1794 (p. 601), and pursued the words of the first count, leaving out the words "and by lying in wait," and charging the fact to have been done "voluntarily and maliciously, and of purpose," both against the principal and accessory.

The third count stated, that Langecake and Hook, contriving to maim and disfigure Jonathan Carmalt, in the peace of God and of the commonwealth then and there being, the said Langecake on the 13th August, 1794, at, etc., voluntarily, wickedly, maliciously, unlawfully, and feloniously, did assault the said Jonathan, and him with a cart-whip, which he in his right hand had and held, the right eye of the said Jonathan, then and there voluntarily, etc., did strike and put out, with intent in so doing to maim and disfigure him, and that Hook, at the time of the felony by Langecake done and committed, voluntarily, etc., was present aiding and abetting Langecake in the felony aforesaid, etc., concluding as in mayhem at common law, against the peace, etc.

"The first clause of our act of assembly of 22d April, 1784, s. 6, is borrowed from the words of the British statute of 22 and 23 Car. II. c. 1, s. 7. It pursues the same language, except that our act particularly enumerates the cutting off 'the ear,' and mildly varies the mode of punishment. Under that statute, commonly called the Coventry Act, it has been adjudged not necessary that either the malice aforethought, or lying in wait, should be expressly proved to be on purpose to maim or disfigure. Leach's case, 193. And also that he who intends to do this kind of mischief to another, *and, by deliberately watching an opportunity*, carries that intention into execution, may be said *to lie in wait on purpose*. Ib. 194; Mills' case.

"Under the first clause of the act of assembly, no intent to maim or disfigure in a *particular* manner is necessary, and therefore on the first count in the indictment, if the general intent is established to the satisfaction of the jury, their next material inquiries will be, as to the malice and lying in wait, whether the same has been proved, or can fairly be inferred from all the circumstances which have been disclosed in evidence.

"The second clause of the 6th section of the act goes further than the Coventry Act, and was evidently introduced to prevent the infamous practice of *gouging*. The words are very comprehensive, and extend to pulling out or putting out the eye, while fighting or otherwise. But we hold it necessary, in order to convict on this clause, that a specific intent to pull out or put out the eye must be shown to the satisfaction of the jury. We apprehend that the evidence will scarcely warrant the conviction of Langecake on the second count; and though Hook has behaved himself grossly amiss during the whole transaction, yet he cannot properly be convicted on either of the two first counts in the indictment.

"On the third and fourth counts, Langecake is admitted by his counsel to be guilty, and perhaps the evidence will suffice to reach Hook on these two last counts."

Sentence was afterwards pronounced against Langecake, that he should undergo a confinement in the jail and penitentiary house for three years, the one-twelfth part to be in the solitary cells; to pay a fine of \$1000, whereof three-fourth parts to be for the use of Carmalt; and give security for his good behavior for seven years, himself in £500, and two sufficient sureties in £250 each, and pay costs.

(o) *State v. Absence*, 4 Port. 397. The court said: "The indictment seems to be in the form pointed out by the most usual and correct precedents, and con-

assault, and that the said W. M., the right ear of him the said W. E. W., then and there on purpose, and of his malice aforethought, unlawfully did bite off. And the jurors aforesaid upon their oaths aforesaid, do further present, that E. A., late of the county aforesaid, in the county aforesaid, etc., with force and arms, on the day and year aforesaid, unlawfully, and on purpose, and of his malice aforethought, was present, aiding and abetting and assisting the said W. M. the said mayhem to do and commit, contrary, etc., and against, etc.

(196) *Biting off an ear, under Rev. Stat. N. C. ch. 34, § 48.(p)*

That defendant, on, etc., at, etc., unlawfully, and on purpose, did bite off the left ear of one J. W., contrary, etc.

tains only one count, which charges Mosely with committing the act, and Absence with being present, and aiding and assisting.

"It is objected, however, that the statute having declared the biting off of an ear to be mayhem, it was necessary to charge the individuals indicted with this legal conclusion. Hawk. vol. 1, p. 107, and 2 Hawk. 311, are relied on to establish this position.

"It is admitted, if a statute adopt a common law offence without otherwise defining the crime, all the common law requirements should be followed in the indictment; thus our statutes affix the punishment of death to murder and rape, without attempting to define the crimes. Here, no doubt, the terms '*murdravit*' and '*rapuit*' would be essential; but when a statute describes a particular act or acts as a misdemeanor or crime of a particular grade, it is not necessary in an indictment, after charging the acts, to state the legal conclusion, that they amount to the misdemeanor or crime of the grade declared by statute, *because such is the conclusion of the law on the facts alleged*. The same reason is conceived applicable to the omission of the word '*feloniously*.' If the statute had declared, that all persons who should be guilty of the crime of mayhem, should be punished in a particular manner, without attempting to further define the offence, the question would properly arise on an indictment framed under such a statute, whether it was necessary to allege the mayhem to have been done feloniously.

"It is sufficient to decide, that the word entering into no part of the definition of this offence, as created by the statute, it was properly omitted in the indictment.

"It is further urged, that there is no sufficient allegation of time and place, so far as Absence is noticed in the indictment.

"The court recognizes the authority of the rule requiring an averment of time and place to each substantive fact charged in the indictment. Arch. C. P. 36. But the indictment, it is believed, conforms to this rule with the utmost precision.

"It follows, as the consequence of these views, that there was no error in refusing to arrest the judgment in the court below."

(p) *State v. Girkin*, 1 Ire. 121. Under this indictment it was held, that an intent to disfigure is *prima facie* to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or at least of the absence of the intent mentioned in the statute. It is not necessary, it was said, in an indictment under this statute, to prove malice aforethought, or a preconceived intention to commit the maim.

(197) *Maliciously breaking prosecutor's arm with intent to maim him, under the Alabama statute.*(q)

That the defendant, with force and arms, in and upon one P. J., did make an assault, and upon the left arm of him the said P. J., with a certain stick, which he the said defendant then and there held in both his hands, did strike and break, and did on purpose and of malice aforethought, unlawfully disable the said left arm of him the said P. J., with intent him the said P. J. then and there to maim, contrary, etc., and against, etc.(r)

To constitute a maim under this statute, by biting off an ear, it is not necessary that the whole ear should be bitten off; it is sufficient if a part only is taken off, provided enough is taken off to alter and impair the natural personal appearance, and to ordinary observation to render the person less comely.

(q) See *State v. Bailey*, 8 Port. 472, where it was held, that where the act of eighteen hundred and seven (Aik. Dig. 102) speaks of disabling a limb or member, a permanent injury is contemplated, such as at common law would constitute *mayhem*; a temporary disabling of a finger, an arm, or an eye, is not sufficient to constitute the statutory offence.

(r) A demurrer was filed to the indictment, which was overruled, and upon a plea of "not guilty" the defendant was convicted, and the sufficiency of the indictment was reserved by the court below for review.

CHAPTER V.

ABDUCTION—KIDNAPPING.(a)

(200) Abduction under New York Rev. Stat. vol. 2, p. 553, § 25.

(200a) Under English statute.

(201) Abduction of a white person, under Ohio stat. p. 51, § 14.

(202) Attempt to carry a white person out of the state, under Ohio stat. p. 51, § 14.

(203) Kidnapping. Attempt to carry off a black person, under Ohio stat. p. 51, § 15.

(203a) Abduction of child, under Pennsylvania statute.

(200) *Abduction under New York Rev. Stat. vol. 2, p. 553, § 25.*

That T. M., late of the First Ward of the city of New York, in the county of New York aforesaid, laborer, on, etc., at the ward, city, and county aforesaid, with force and arms, in and upon one J. T., in the peace of God and of the said people, then and there being, feloniously did make an assault, and her the said J. T. then and there feloniously did take against her will,(b) with the intent to compel her by force, menace, and duress to be defiled, and other wrongs to the said J. T. then and there did, to the great damage of the said J. T., against, etc., and contrary, etc.

(200a) *Abduction of woman on account of her fortune, under English statute.*

That J. S., on, etc., at, etc., feloniously, and from motives of lucre, did take away and detain one A. N., against her will, she, the said A. N., then having a certain present and absolute interest (or conditional, or contingent, or future) in certain real estate (or personal estate), with intent her, the said A. N., to marry, against, etc.(c)

(a) See Wh. Cr. L. 8th ed. §§ 586 *et seq.*

(b) This is essential. Click *v.* State, 3 Tex. 282.

(c) Arch. C. P. 19th ed. 757.

(201) *Abduction of a white person, under Ohio stat. p. 51, § 14.(d)*

That A. B., C. D., and E. F., on the twenty-second day of May, in the year of our Lord one thousand eight hundred and fifty-four, in the county of Hamilton aforesaid, one M. N., a white person, then and there being, did unlawfully, fraudulently, and wickedly, and without any lawful warrant or authority whatever, then and there seize, take, steal, and kidnap, and him the said M. N. then and there did forcibly, fraudulently, and against his will, and without his consent, carry off out of this state, contrary, etc. (*Conclude as in book 1, chapter 1.*)

(202) *Attempt to carry a white person out of the state, under Ohio stat. p. 51, § 14.(e)*

That A. B., C. D., and E. F., on the twenty-second day of May, in the year of our Lord one thousand eight hundred and fifty-four, in the county of Hamilton aforesaid, one M. N., a white person, then and there being, did forcibly, fraudulently, and wickedly, and not in pursuance of any law of this state, arrest and imprison, with an intention then and there of having him the said M. N. carried out of this state without the consent of him the said M. N., and against his will. (*Conclude as in book 1, chapter 1.*)

(203) *Kidnapping—Attempt to carry off a black person, under Ohio stat. p. 51, § 15.(f)*

That A. B., C. D., E. F., G. H., I. J., and K. L., late of said county, heretofore, to wit, on the twenty-seventh day of March, in the year of our Lord one thousand eight hundred and forty-six, at the county of Franklin aforesaid, under the pretence that M. N., a free black person, then and there being, was then and there a slave, did with force and arms and by violence, fraud, and deception, seize upon the said M. N., a free black person, then and there being, and did then and there keep the said M. N., a free black person as aforesaid, in restraint and confinement for a long space of time, to wit, three hours, with intent to transport him the said M. N. out of the State of Ohio, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(d) Warren's C. L. 70.

(e) Warren's C. L. 70.

(f) Warren's C. L. 70.

(203a) *Abduction of child under Pennsylvania statute.*

That heretofore, to wit, on the first day of July, in the year of our Lord one thousand eight hundred and seventy-four, at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., Charles Brewster Ross was then and there a minor child, under the age of six years; and he the said Charles Brewster Ross was then and there in the lawful charge, care, and possession of his parents, Christian K. Ross, and Sarah Ann Ross, she the said Sarah Ann Ross then and there being the lawfully wedded wife of the aforesaid Christian K. Ross, and they the said Christian K. Ross and Sarah Ann Ross then and there lived and cohabited together as husband and wife, as aforesaid; and he the said Charles Brewster Ross was then and there the lawful child and issue of them the said Christian K. Ross and Sarah Ann Ross his wife as aforesaid.

And the grand inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that William Westervelt, late of the said county, yeoman, and Mary Westervelt, late of the said county, matron, and William Mosher, late of the said county, yeoman, *alias* William Henderson, and Joseph Douglass, late of the said county, yeoman, *alias* Joseph Clark, afterwards, to wit, on the said first day of July, in the year aforesaid, at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., unlawfully, fraudulently, wilfully, and maliciously, did decoy, entice, lead, take, and carry away the said Charles Brewster Ross, out of and from the lawful charge, care, and possession of the said Christian K. Ross and Sarah Ann Ross his wife as aforesaid, and him the said Charles Brewster Ross, from his said parents did then and there unlawfully, fraudulently, wilfully, and maliciously conceal and detain, with intent thereby, then and there unlawfully, fraudulently, wilfully, and maliciously to deprive the said Christian K. Ross and Sarah Ann Ross of their lawful charge, care, and possession of the said Charles Brewster Ross as aforesaid, contrary, etc. (g)

(g) This is the first count of the indictment in Westervelt's case, Phil. 1875, the child abducted being "Charlie Ross." Several counts for conspiracy followed. The defendants were found guilty on a general verdict. 32 Legal Intel. 346.

The punishment for conspiracy was two years' imprisonment; the punishment for abduction was seven years. The court sentenced the defendant to seven years' imprisonment. The Supreme Court refused an allocatur, holding that the sentence was proper.

CHAPTER VI.

ABORTION.(a)

- (204) Production of abortion at common law. First count. By assault and thrusting an instrument in the prosecutrix's womb, she being "big, quick, and pregnant."
- (205) Second count, averring prosecutrix to be "big and pregnant."
- (206) Third count, merely averring pregnancy in same.
- (207) Assault on a woman with quick child, so that the child was brought forth dead. (At common law.)
- (208) Against A. the principal, for producing an abortion by using an instrument on the person of a third party, and B. an accessory before the fact, under the English statute.
- (209) Administering a potion at common law with the intent to produce abortion.
- (210) Producing abortion in New York, 2 R. S. 550, 551, § 9, 2d ed.
- (210a) Same in Massachusetts.
- (210b) Another form.
- (210c) Against accessory before the fact with unknown principal.
- (210d) Form used in Philadelphia in 1880.
- (210e) Same averring death.
- (211) Administering medicine under the Indiana statute, with intent to produce abortion.
- (212) Attempt to procure abortion by administering a drug, under Ohio statute.

(204) *Production of abortion at common law.*(b)

First count. By assault and thrusting an instrument in the prosecutrix's womb, she being "big, quick, and pregnant."

That W. B. T., late of the said county, yeoman, A. D., *alias*

(a) See Wh. C. L. 8th ed. § 592.

That the indictments, when the offence is statutory, must conform to the statute, see *U. S. v. May*, 2 McArthur, 512; *Com. v. Snow*, 116 Mass. 47; *Com. v. Brown*, 121 Mass. 69; *State v. Owens*, 22 Minn. 238; *State v. McIntyre*, 19 Minn. 93; *Willey v. State*, 52 Ind. 246. As to New York statute, see *People v. Lohman*, 2 Barb. 216; 1 Comst. 379; *People v. Stockham*, 1 Park. C. R. 424; *Davis v. People*, 2 Th. & C. 212; *Mongeon v. People*, 54 N. Y. 613. As to Wisconsin, see *State v. Dickinson*, 41 Wis. 299.

(b) This indictment was sustained in *Com. v. Demain*, 6 Penn. L. J. 29; Brightly R. 441.

A. F., late of the said county, single woman, and — F., late of the said county, yeoman, on, etc., with force and arms, etc., at the county aforesaid, and within the jurisdiction of the said court, in and upon one S. R. S., then and there being big, pregnant, and quick with child, did make a violent assault, and her the said S. then and there did violently bruise, wound, and ill-treat, so that her life was thereby despaired of; and a certain instrument, made of silver or other metal, in the shape and form of a hook, up and into the womb and body of the said S., then and there violently, wickedly, and inhumanly did force and thrust, with a wicked intent, to cause and procure(c) the said S. R. S. to miscarry, abort, and to bring forth the said child, of which she was big, quick, and pregnant, as aforesaid, dead, and to kill and murder the said child, by reason and means of which said last mentioned premises, the said child was killed and its life destroyed and taken away in its mother's womb; and she, the said S., afterwards, to wit, on, etc., miscarried and was aborted and delivered of the said child, being a female child, and being at the time of its birth dead, to the great injury and detriment of the said S., to the evil example of all others in like manner offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(205) *Second count, averring prosecutrix to be "big and pregnant."*

That the said W. B. T., A. D. *alias* A. F., and — F., afterwards, to wit, on the day and year aforesaid, at the county

In the Supreme Court judgment on demurrer was entered for the commonwealth, Sergeant, J., delivering the following opinion:—

"We see nothing in any of the points taken by the defendants in demurrer.

"1. This exception is only pleadable in abatement, in which the defendant must give a better name. It is not cause of demurrer.

"2. The indictment is in proper form, and sufficiently avers that she (the party injured) was pregnant and quick with child, which was destroyed and killed, etc.

"3. This exception is not true in fact. The indictment contains but seven counts, with the usual conclusions.

"4. This exception is not cause of demurrer. If the counts are improperly joined, the court may be asked to interfere before the trial, and put the commonwealth to its election.

"5. The name Ford alone, there being no plea in abatement, is not a nullity; and as to inserting Susannah Schoch as a party, that rests with the prosecution. Two or more may be indicted for a conspiracy with others not parties."

(c) This is necessary at common law, and under the statutes. *State v. Drake*, 1 Vroom (N. J.), 432

aforesaid, and within the jurisdiction of the said court, in and upon the said S. R. S., then and there being big and pregnant(*d*) with a certain other child, did make another violent assault, and a certain other instrument, made of silver or other metal, in the shape and form of a hook, up and into the womb and body of the said S., then and there violently, wickedly, and inhumanly did force and thrust, with a wicked intent to cause and procure the said S. to miscarry, and to bring forth the said child of which she was big and pregnant, as last aforesaid, dead, by reason and means of which said last mentioned premises, she the said S., afterwards, to wit, on, etc., miscarried, and was delivered of the said child, being a female child, the said child being dead at the time of delivery, to the great injury and detriment of the said S., to the evil example of all others in like manner offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(206) *Third count, merely averring pregnancy in same.*

That the said W. B. T., A. D. *alias* A. F., and — F., afterwards, to wit, on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of the said court, in and upon the said S. R. S., then and there being pregnant with a certain other child, did make another violent assault, and a certain other instrument, made of silver or other metal, in the shape and form of a hook, up and into the womb and body of the said S., then and there violently, wickedly, and inhumanly did force and thrust, with a wicked intent, to wit, to cause and procure the said S. to miscarry and to bring forth the said child of which she was big and pregnant, as last aforesaid, dead, to the great injury and detriment of the said S., to the evil example of all others in like manner offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(*d*) That “quickening” is not essential to the indictment, see *Com. v. De-main, supra*; *Mills v. Com.*, 13 Penn. St. 631. It has been held otherwise at common law in Massachusetts; *Com. v. Parker*, 9 Met. 263; New Jersey; *State v. Cooper*, 2 Zab. 57; and Iowa; *Abrams v. Foshee*, 3 Clarke, 274.

(207) *Assault on a woman with quick child, so that the child was brought forth dead. (At common law.)(e)*

That defendant, on, etc., at, etc., in and upon M., the wife of one W. E., then and there being big with a quick child, did make an assault; and her the said M., then and there did beat, wound, and ill-treat, so that her life was greatly despaired of, by reason whereof she the said M., afterwards, to wit, on, etc., at, etc., did bring forth the said child dead, and other wrongs to the said M. then and there did, against, etc. (*Conclude as in book 1, chapter 3.*)

(208) *Against A. the principal, for producing an abortion by using an instrument on the person of a third party, and B. an accessory before the fact, under the English statute.(f)*

That T. A., late of, etc., on, etc., at, etc., feloniously, unlawfully, and maliciously did use a certain instrument, the name of which instrument is to the jurors unknown, by then and there forcing, thrusting, and inserting the said instrument into the

(e) Stark. C. P. 429.

(f) R. v. Ashmall, 9 C. & P. 236. At the trial, the defendant, Ashmall, was called, but did not appear; but Fay, who had been on bail, appeared. Godson, for the defendant Fay: "I submit that my client is not compellable to plead to this indictment. He is indicted as an accessory, and as an accessory only. Formerly an accessory before the fact could in no case be brought to trial without his principal, except after the conviction of his principal, or by his own consent. But now, by the stat. 7 Geo. IV. c. 64, s. 9, accessories before the fact may be tried in either one of three modes: 1st, with the principal; 2d, after the conviction of the principal felon; or, 3d, for a substantive felony. This indictment is not for a substantive felony, because everything charged against Mr. Fay is charged as having been done accessarily to Ashmall; and what shows decisively that Mr. Fay is charged as an accessory only, is, that if Mr. Ashmall was acquitted on this indictment, Fay must be acquitted also as a legal consequence." Carington, on the same side: "At the time of the passage of the act, 7 Geo. IV. c. 64, I had occasion to compare it with all the previous enactments on the subject, and I believe I am correct in stating that the only alteration in the law then made, as to the trial of accessories without and before the conviction of the principal, was by the provisions relating to the accessory being indicted for a substantive felony. I submit, also, that an indictment for a substantive felony must be so framed as not to depend on the conviction or acquittal of any person, except the party who is charged with the substantive felony; indeed, the ordinary counts for the substantive felony of being accessory do not even name the principal, but merely state him to be 'a certain evil disposed person.'" Gurney, B. (after conferring with Patterson, J.): "My learned brother Patterson concurs with me in opinion that Mr. Fay is not compellable to plead to this indictment at present. There might have been an indictment against him for a substantive felony, but this is not so."

private parts of H. L., now known by the name of H. E., with intent in so doing, then and there and thereby to procure the miscarriage of the said H. L., now known by the name of H. E., against, etc., and against, etc. And the jurors aforesaid, upon their oath aforesaid, do further present, that T. J. F., late of, etc., before the committing of the felony by the said T. A., as aforesaid, to wit, on, etc., at, etc., feloniously did procure, counsel, and command the said T. A. the felony aforesaid, in manner and form aforesaid, to commit, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(209) *Administering a potion at common law, with intent to produce abortion.(g)*

That A. B., of in the county of laborer, on, etc., at B. aforesaid, in the county aforesaid, did, unlawfully and wickedly, administer to, and cause to be administered to and taken by one C. D., single woman, she the said C. D. being then and there pregnant and quick with child, divers quantities, to wit, four ounces, of a certain noxious, pernicious, and destructive substance called *savine*; ^(h) with intent thereby to cause and procure the miscarriage of the said C. D., and the premature birth of the said child, of which the said C. D. was then and there pregnant and quick; by the means whereof, the abortion, miscarriage, and premature birth of the said child was caused and produced. And she the said C. D., afterwards, to wit, on, etc., next following, at B. aforesaid, in the county aforesaid, by means of the noxious, pernicious, and destructive substance aforesaid, so as aforesaid administered by the said A. B., and taken by the said C. D., was prematurely delivered of the said child, against, etc. (*Conclude as in book 1, chapter 3.*)

(210) *Producing abortion in New York, 2 R. S. 550-51, § 9, 2d ed.*

That, etc., on, etc., in and upon one S. S., she the said S. S., then and there, etc., being pregnant with a quick ⁽ⁱ⁾ child, feloniously and wilfully did make an assault; and that the said de-

(g) 3 Chit. C. L. 797, 800; Davis's Prec. 33.

(h) Not necessary to state the medicine. *State v. Van Houten*, 37 Mo. 357; *State v. Vawter*, 7 Black. 922. *Infra*, note to 210a.

(i) Under this, there may be a conviction when the child is not quick. *People v. Jackson*, 3 Hill, 92; *Lohman v. People*, 1 Comst. 379.

fendant on, etc., feloniously and wilfully did use and employ on and upon the body and womb of the said S. S., the mother of the said quick child, certain instruments, to wit, one piece of wire, etc., with the intent thereby then and there feloniously and wilfully to destroy the said quick child,(j) the same not being necessary to preserve the life of the said S. S., the mother of the said child, and not having been advised by two physicians to be necessary for such purpose;(k) by means whereof the death of the said quick child was thereby produced, contrary, etc., against, etc.(l) (*Conclude as in book 1, chapter 3.*)

(210a) *Abortion, under Mass. stat. c. 27.(m)*

That A. B., etc., on, etc., at, etc., “with force and arms, maliciously, and without lawful justification, did force and thrust a certain metallic instrument, which he the said W. then and there had and held in his hand, into the womb and body of a certain woman by the name of S. C., she the said S. being then and there pregnant with a child, with the wicked and unlawful intent of him the said W. then and there to cause and procure the said S. to miscarry and prematurely to bring forth the said child, with which she was then and there pregnant as aforesaid; and she, the said S., on, etc., at, etc., by means of the said forcing and thrusting of said instrument into the womb and body of the said Sarah, in manner aforesaid, did bring forth the said child of which she was so pregnant, dead; against, etc.” (*Conclude as in book 1, chapter 3.*)

(210b) *Another form.*

That (the defendant) on, etc., at, etc., in and upon one E. A. F., then and there being pregnant with child, unlawfully did

(j) An indictment omitting this averment is defective under the statute as an indictment for manslaughter, though good for the misdemeanor. *Lohman v. People*, 2 Barb. 216; 1 Comst. 379.

(k) That the averment of exceptions is unnecessary, see *State v. Rupe*, 41 Tex. 33.

(l) On this indictment—to which there is a second count, averring the operation to have been with an instrument unknown—the court on trial held that if the jury doubted as to the killing of the *quick* child, which is manslaughter by the Rev. Statutes, they could convict of killing the child not quick, which is but a misdemeanor. The jury having found the defendant guilty of the misdemeanor, the directions given below were sustained by the Supreme Court. *People v. Jackson*, 3 Hill, 93.

(m) This was sustained in *Com. v. Wood*, 11 Gray, 86.

make an assault, and a certain instrument, the name of which is to the jurors unknown, up and into the womb and body of the said F., unlawfully did force and thrust, with intent then, there, and thereby to cause and procure the said F. to miscarry, abort, and to bring forth the said child of which she was pregnant as aforesaid, and to kill and murder said child, by reason and means of which said last mentioned premises, the said child was killed and its life destroyed in its mother's womb, and she, the said F., afterwards, to wit, on, etc., miscarried, and was aborted and delivered of the said child, the sex thereof being to the jurors unknown, said child being at the time of its birth dead.(n)

(210c) *Accessory before the fact in Massachusetts.*

“And the jurors aforesaid, for, etc., on their oath aforesaid, do further present, that a certain person, whose name and a more particular description of whom are to said jurors unknown, on, etc., at, etc., with force and arms, with intent to procure the miscarriage of one A. F. C., did unlawfully use some unlawful means to the said jurors unknown, with said intent, she the said A. being then and there pregnant with child; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. afterwards, to wit, on, etc., at, etc., by means of the unlawful means so as aforesaid to the said jurors unknown, in manner and form aforesaid used by said person so as aforesaid unknown, then and there died; against the peace, etc. And the jurors aforesaid, for, etc., on their oath aforesaid, do further present, that G. A. E., M. J. A., and M. E. S., before the said felony and abortion was committed in manner and form aforesaid, to wit, on, etc., with force and arms, at, etc., did feloniously and maliciously incite, move and procure, aid, counsel, hire, and command the said person as aforesaid unknown the said felony

(n) *Com. v. Snow*, 116 Mass. 47. In this case it was held that the allegation as to the time and place of the offence applied to the particular acts set forth as the means by which the abortion was alleged to be performed, as well as to the alleged assault. And it was held also that the instrument and the means by which it was used were sufficiently described. It was further held that it was not necessary to prove an assault, or an intent to kill the child, and that the defendant might be convicted although the woman consented.

and abortion, in manner and form aforesaid, then and there to do and commit, against the peace," etc.^(o)

(210d) *Form used in Philadelphia in 1880.*

First count. By unknown drug.

That late of the said county on the day of in the year of our Lord one thousand eight hundred and at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., unlawfully and wilfully did feloniously administer to one she the said being then and there a woman pregnant with child, a certain drug and substance, the name and components of the said drug and substance being to this grand inquest as yet unknown, with intent thereby then and there to procure the miscarriage of her the said contrary, etc.

Second count. By poison.

That the said late of the said county on the said day of in the year of our Lord one thousand eight hundred and at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., unlawfully and wilfully did feloniously administer to one she the said being then and there a woman pregnant with child, a certain poison, drug, and substance, the name and components of the said poison, drug, and substance being to this grand inquest as yet unknown, with intent thereby then and there to procure the miscarriage of her the said contrary, etc.

Third count. By unknown instruments.

That the said late of the said county on the said day of in the year of our Lord one thousand eight hundred and at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., unlawfully and wilfully did feloniously use a certain instrument, the name of which said instrument is to this grand inquest as yet unknown, in, upon, about, and within the body of the said she the

^(o) Sustained as against an accessory before the fact in *Com. v. Adams*, 127 Mass. 15.

said being then and there a woman pregnant with child, with intent thereby then and there to procure the miscarriage of her the said contrary, etc.

Fourth count. By unknown means.

That the said late of the said county on the said day of in the year of our Lord one thousand eight hundred and at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., unlawfully and wilfully did feloniously use certain means, the nature of which said means is to this grand inquest as yet unknown, in, upon, about, and within the body of the said she the said being then and there a woman pregnant with child, with intent thereby then and there to procure the miscarriage of her the said contrary, etc.

(210e) Same, avowing death. By unknown drug.

That late of the said county on the day of in the year of our Lord one thousand eight hundred and at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., unlawfully and wilfully did feloniously administer to one she the said then and there being a woman pregnant with child, and supposed and believed by the said to be then and there pregnant with child, a certain drug, the name and components of the said drug being to this grand inquest as yet unknown, with intent thereby then and there to procure the miscarriage of her the said ; and in consequence of the unlawful, wilful and felonious administering of the said drug, as aforesaid, the said did then and there become sickened and distempered in her body, and afterwards, to wit, on the said day of in the year aforesaid, at the county aforesaid, and within the jurisdiction of this court, in consequence of the unlawful, wilful, and felonious administering of the said drug as aforesaid, and of the sickness and distemper in her body as aforesaid, did die, contrary, etc.

Second count. By unknown poison.

That the said late of the said county on the said

day of in the year of our Lord one thousand eight hundred and at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., unlawfully and wilfully did feloniously administer to one she the said then and there being a woman pregnant with child, and supposed and believed by the said to be then and there pregnant with child, a certain poison, drug and substance, the name and components of the said poison, drug and substance being to this grand inquest as yet unknown, with intent thereby then and there to procure the miscarriage of her the said ; and in consequence of the unlawful, wilful, and felonious administering of the said poison, drug, and substance as aforesaid, the said did then and there become sickened and distempered in her body, and afterwards, to wit, on the said day of in the year aforesaid, at the county aforesaid, and within the jurisdiction of this court, in consequence of the unlawful, wilful, and felonious administering of the said poison, drug, and substance as aforesaid, and of the sickness and distemper in her body as aforesaid, did die, contrary, etc.

Third count. By unknown means.

That the said late of the said county on the said day of in the year of our Lord one thousand eight hundred and at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., unlawfully and wilfully did feloniously use certain means, the nature of which said means is to this grand inquest as yet unknown, in, upon, about, and within the body of the said she the said being then and there a woman pregnant with child, and supposed and believed by the said to be then and there pregnant with child, with intent thereby then and there to procure the miscarriage of her the said ; and in consequence of the unlawful, wilful, and felonious using of the said means as aforesaid, the said did then and there become sickened and distempered in her body, and afterwards, to wit, on the said day of in the year last aforesaid, at the county aforesaid, and within the jurisdiction of this court, in consequence of the unlawful, wilful, and felonious using of the said

means as aforesaid, and of the sickness and distemper in her body as aforesaid, did die, contrary, etc.(p)

(211) *Administering medicine, under the Indiana statute, with intent to produce abortion.(q)*

That A. B., on, etc., at, etc., did feloniously, wilfully, and unlawfully administer to one L. H., then and there being pregnant with a child, a large quantity of medicine with intent thereby feloniously, etc., to procure the miscarriage of said L. H., the administering said medicine to said L. H. not then and there being necessary to preserve the life of said L. H., contrary to the statute, etc. (*Conclude as in book 1, chapter 3.*)

(212) *Attempt to procure abortion by administering a drug, under Ohio statute.*

That A. B., on the first day of October, in the year of our Lord one thousand eight hundred and fifty, in the county of Cuyahoga aforesaid, unlawfully, wilfully, and feloniously did administer to, and cause(r) to be taken by one M. N., then and there being a pregnant woman, a large quantity of a certain noxious and poisonous drug and substance, to wit, one pint of a certain noxious and poisonous decoction of brandy, logwood, and other poisonous drugs and medicines to the deponent aforesaid unknown, with intent then and there, and thereby, to pro-

(p) For the above two preceding forms I am indebted to W. W. Ker, Esq., formerly assistant district attorney in Philadelphia.

(q) *State v. Wawter*, 7 Blackf. 592. The objection made to the indictment was, that it neither names the medicine administered, nor states that it was noxious.

The language of the statute is, that "every person who shall wilfully administer to any pregnant woman any medicine, drug, substance, or thing whatever, or employ any instrument, etc., with intent thereby to procure the miscarriage of any woman," etc. "This statute," said the court, "so far as the present case is concerned, is similar to the second section of the statute of 43 Geo. III.; and it has been held that, on the trial of an indictment on that section, the name of the medicine administered need not be proved; that the question is, whether the prisoner administered any matter or thing to the woman with intent to procure abortion." *Rex v. Phillips*, 3 Campb. 73. I think the name of the medicine need not be proved; there seems to be no good reason for naming it in the indictment. It is also decided in the case first referred to, that the indictment need not describe the medicine as noxious. See *State v. Van Houten*, 37 Mo. 357.

(r) As to meaning of this term see *R. v. Wilson*, D. & B. 127; 7 Cox C. C. 190; *R. v. Farron*, D. & B. 164.

cure the miscarriage of the said M. N.; said administering and taking the aforesaid poisonous and noxious decoction of brandy, logwood, and other unknown noxious and poisonous drugs and medicines, then and there being wholly unnecessary for the preservation of the life of the said M. N., and said administering and taking said noxious and poisonous decoction of brandy, logwood, and said unknown noxious drugs and medicines then and there not having been advised by two physicians to be necessary for the preservation of the life of the said M. N.^(s) (*Conclude, etc.*)

(s) Warren's C. L. 95.

CHAPTER VII.

ASSAULTS.

- (213) Indictment for a common assault.
- (214) Assault without battery.
- (215) Assault and battery. Massachusetts form.
- (216) Information in Connecticut for assault and battery and breach of peace, with commencement and conclusion.
- (217) Assault and battery in New York, with commencement and conclusion.
- (218) Assault and battery in New Jersey, with commencement and conclusion.
- (219) Assault and battery in Pennsylvania, with commencement and conclusion.
- (220) Threatening in a menacing manner, under Ohio statute.
- (221) Assault and encouraging a dog to bite.
- (222) Assault and tearing prosecutor's hair.
- (223) Assaulting the driver of a chaise, and overturning the chaise with the wheel of a cart.
- (224) Assault and beating out an eye.
- (225) Assault and riding over a person with a horse.
- (226) [For assault on a pregnant woman, see 204, etc.]
- (227) Assault by administering cantharides to prosecutor.
- (228) Assault with intent to kill an infirm person, by throwing him on the ground and beating him.
- (229) For throwing corrosive fluid, with intent, etc.
- (230) [See for "assaults with intent," etc., 242, etc., and also, 1046, etc.]
- (231) Assault with beating and wounding on the high seas.
- (232) Assault on high seas, by binding the prosecutor and forcing an iron bolt down his throat.
- (233) Stabbing with intent to wound, under Ohio stat. p. 49, § 6.
- (234) Shooting with intent to wound, under Ohio stat. p. 49, § 6.
- (235) Assault on high seas, with dangerous weapon.
- (236) Another form for same.
- (237) Same in a foreign port, the weapon being a Spanish knife.
- (238) Second count, same as first, charging the instrument differently.
- (239) Third count. Assault with intent to kill.
- (240) Assault and false imprisonment at common law.
- (241) Assault and false imprisonment, with the obtaining of five dollars.
- (242) Assault with intent to commit murder or other felony at common law.

- (243) Another form for same.
- (244) Assault with intent to drown.
- (245) Assault with intent to murder, under the New York Rev. Stat.
- (246) Second count. With intent to maim.
- (247) Assault with intent to commit a felony generally.
- (248) Felonious assault, under the Massachusetts statute.
- (248a) Assault with intent to murder, under same statute.
- (248b) Shooting in Indiana.
- (249) Assault with intent to murder, in South Carolina.
- (249a) Same in Indiana.
- (250) Felonious assault with intent to rob, being armed. Rev. Sts. of Mass.
ch. 125, § 14.
- (250a) Same under English statute.
- (251) Assault with intent to rob, against two.
- (252) Another form for same.
- (253) Assault with intent to ravish.
- (254) Same under Rev. Sts. of Mass. ch. 125, § 19.
- (255) Assault with intent to ravish, under Ohio stat. p. 48, § 4.
- (256) Another form for assault with intent to ravish.
- (257) Same against two.
- (259) Indecent assault.
- (260) Indecent assault with intent to have an improper connection.
- (261) Indecent assault by stripping.
- (262) Assault with intent to rape. Attempting to abuse a female under ten
years of age under Ohio stat. p. 48, § 4.
- (263) Assault with intent to steal.
- (263a) Injury to child by withholding its food.

(213) *Indictment for a common assault.*

That A. B.,^(a) late of, etc., on, etc., with force and arms,^(b)
in and upon one C. D.,^(c) in the peace of God and of the said
state then and there being,^(d) did unlawfully^(e) and wilfully^(f)
make an assault ;^(g) and him the said C. D. did then and there

- (a) That two or more defendants may be joined, see Wh. Cr. L. 8th ed. § 638.
- (b) As to necessity of these words, see *supra*, chap. II. form 2, p. 16.
- (c) The injured party may be charged as unknown. Wh. Cr. Pl. & Pr. § 111 ;
supra, notes to form 2, p. 20.
- Two or more persons assaulted by a single blow may be joined. Wh. on Cr.
Ev. § 590. Otherwise when the act was not single. *Ib.* ; State v. McClintock, 8
Iowa, 203. That it is not necessary to aver that the party injured was at the
time alive, see Com. v. Ford, 5 Gray, 475.
- (d) This is surplusage. *Supra*, notes to form 114.
- (e) "Unlawfully" is unnecessary, though harmless. Wh. Cr. Pl. & Pr. § 269 ;
Bloomer v. State, 3 Sneed, 66 ; State v. Bray, 1 Mo. 126.
- (f) See State v. Bray, 1 Mo. 126.
- (g) In Louisiana this is not necessary where the facts making up the assault are
averred. State v. Munce, 12 La. Ann. 625.

(216)

OFFENCES AGAINST THE PERSON.

beat,^(h) wound, and ill-treat, and other wrongs to the said C. D. then and there did, against the peace, etc. (*Conclude as in book 1, chapter 3.*)

(214) *Assault without battery.*

That A. B., of in the county of laborer, on, etc., with force and arms, at in the county aforesaid, in and upon one C. D. (in the peace of the said commonwealth then and there being), with a certain offensive weapon called a cane, did make an assault, and other wrongs to the said C. D. then and there did and committed, to the great injury of him the said C. D., etc. (*Conclude as in book 1, chapter 3.*)

(215) *Assault and battery. Massachusetts form.*

That A. B., of in the county of laborer, on, etc., with force and arms, at in the county aforesaid, in and upon the body of one C. D. (in the peace of the said commonwealth then and there being) an assault did make, and him the said C. D. did then and there beat, abuse, wound, and ill-treat, and other wrongs then and there did and committed, to the great damage of the said C. D., and against the peace and dignity of the commonwealth aforesaid. (*Conclude as in book 1, chapter 3.*)

(216) *Information in Connecticut for assault and battery and breach of peace, with commencement and conclusion.*

State of Connecticut, New Haven County, ss. New Haven,
day of 184

To justice of the peace for said county, residing in said town, comes a grand juror for said town, and on his oath of office, information makes, that, at said New Haven, on the day of 184 with force and arms, in and upon in the peace then and there being, did make an assault, and the said then and there did beat, bruise, wound, and ill-treat; and other wrongs and injuries then and there did,

(h) The practice is to allege a battery, though if no battery be shown, the defendant may be convicted of a common assault. Wh. Cr. L. 8th ed. § 640, and cases there cited. The particular acts of violence need not be set forth when an assault is averred. *Bloomer v. State*, 3 Sneed (Tenn.), 66.

to the great damage of the said and against the peace. And the grand juror further informs, that the said with force and arms, on the day and year last aforesaid, at New Haven aforesaid, by tumultuous and offensive carriage towards, and by threatening, traducing, challenging, quarrelling, assaulting, beating, and striking in the peace then and there being, did greatly disturb the public peace, and other wrongs and injuries then and there committed, against the peace, of evil example, and contrary to the statutes in such cases made and provided. And the grand juror aforesaid further complains, that (*setting forth further breach of peace, if any, etc.*). Wherefore the grand juror aforesaid prays process, and that the said may be arrested and held to answer the complaint, and be dealt with according to law. Dated at New Haven the day and year first aforesaid.

Grand Juror.

(217) *Assault and battery in New York, with commencement and conclusion.*

City and County of New York, ss. The jurors of the people of the state of New York, in and for the body of the city and county of New York, upon their oath present,

That A. B., late of the First Ward of the city of New York, in the county of New York aforesaid, etc., on, etc., at the ward, city, and county aforesaid, in and upon the body of C. D., in the peace of God and of the said people, then and there being, with force and arms did make an assault; and him the said C. D. did then and there beat, wound, and ill-treat, and other wrongs and injuries to the said C. D. then and there did, to the great damage of the said C. D., to the evil example of all others in like case offending, and against the peace of the people of the state of New York, and their dignity, etc.

(218) *Assault and battery in New Jersey, with commencement and conclusion.*

County, to wit: The grand inquest for the state of New Jersey, and for the body of the county of upon their present,

That A. B., late of the township of in the county of

on, etc., with force and arms, at the township aforesaid, in the county aforesaid, and within the jurisdiction of this court, in and upon one C. D., in the peace of God and of this state, then and there being, an assault did make, and him the said C. D. then and there did beat, wound, and ill-treat, and other wrongs to the said C. D. then and there did, to the great damage of the said C. D., contrary to the form of the statute in such case made and provided, and against the peace of this state, the government and dignity of the same.

(219) *Assault and battery in Pennsylvania, with commencement and conclusion.*

In the Court of Quarter Sessions of the peace for the city and county of Philadelphia, Sessions, 187

City and County of Philadelphia, ss.

The grand inquest of the commonwealth of Pennsylvania, inquiring for the city and county of Philadelphia, upon their respective oaths and affirmations do present, that A. B., late of said county, etc., at the county aforesaid, and within the jurisdiction of this court, with force and arms, in and upon one C. D., in the peace of the said commonwealth, then and there being, did make an assault, and him the said C. D. did beat, wound, and ill-treat, and other wrongs to him the said C. D. then and there did, to the great damage of the said C. D., and against the peace and dignity of the commonwealth of Pennsylvania.

(220) *Threatening in a menacing manner, under Ohio statute.(i)*

That A. B., on the day of in the year of our Lord
one thousand eight hundred and in the county of

(i) "This offence," says Mr. Warren, "is defined in the same section of the statute that defines assault and battery. And in Hamilton County it has been the practice, uniformly, to charge it in the same count with those offences. Otherwise than this, no precedents for the offence have been found by the compiler. The offence is quite different from an assault. By the common law, in a prosecution for an assault, if the defendant could make it appear that he only intended to terrify by his conduct and gesticulations, he could not then be convicted, for an assault is an *attempt* to do an injury. But the legislature of Ohio wisely provided against this injustice by imposing the same penalty upon him who attempts to put another in fear, as upon him who actually commits or attempts to commit personal violence; thus establishing the true theory that every man has a right not only to *be* safe, but also to *feel* safe. The words 'in a men-

aforesaid, designing and intending one M. N., then and there being, in great bodily fear to put, him the said M. N. then and there did unlawfully and maliciously threaten, in a menacing manner.

(221) *Assault and encouraging a dog to bite.*(j)

That A. B., of in the county aforesaid, laborer, on, etc., now last past, at B. aforesaid, in the county aforesaid, in and upon one C. D. an assault did make, and him the said C. D. did then and there beat, wound, and abuse, and that he the said A. B. did then and there unlawfully incite, provoke, and encourage a certain dog, belonging to him the said A. B., him the said C. D. then and there to beset and bite; by means whereof the same dog did then and there grievously bite the right leg of him the said C. D., whereby the said leg of him the said C. D. was grievously hurt and wounded, and his life greatly endangered, and other wrongs to the said C. D. then and there did, to the great damage of the said C. D., against, etc.

(222) *Assault and tearing prosecutor's hair.*(k)

That A. B., of in the county aforesaid, laborer, on, etc., with force and arms, at in the county aforesaid, in and upon the body of one C. D. (in the peace of the said commonwealth, then and there being) did make an assault, and her the said C. D. did then and there beat, wound, and abuse; and that he the said A. B. did then and there unlawfully, violently, and cruelly seize and lay hold of the said C. D., by the hair of her head, and did then and there with great force, wrath, and violence, pull and drag the said C. D. by the same; by means whereof he the said A. B. did then and there unlawfully, cruelly, and brutally pull and tear the hair of the head of her the said C. D. off by the roots, and the head of her the said C. D. was thereby grievously wounded and hurt, and the said C.

acing manner' imply that there must be something more than a threat to do a future injury; there must be a menacing with the fist or a weapon, or some indication that the offender intends to carry his threats into immediate execution, or otherwise this offence will not be complete. And the offence may doubtless be committed without uttering even a single word of speech." Warren's C. L. 62.

(j) 3 Chit. C. L. 824; Cro. C. C. 145; Stark. C. P. 389; Davis's Prec. 58.

(k) Davis's Prec. 56.

D. thereby put in great pain and torture, and other wrongs then and there did and committed, to the great damage of her the said C. D., against, etc. (*Conclude as in book 1, chapter 3.*)

(223) *Assaulting the driver of a chaise, and overturning the chaise with the wheel of a cart.*(l)

That A. B., of in the county of laborer, on, etc., with force and arms, at B., in the county aforesaid, in and upon one C. D. did make an assault, he the said C. D. being then and there in a certain chaise drawn by one horse, and in the public street and common highway there; and that he the said A. B., then and there driving a horse drawing a cart, did, in the highway aforesaid, unlawfully, violently, wantonly, and maliciously drive said horse, so as aforesaid drawing said cart, to and against the chaise aforesaid, and that by such driving did then and there, in the highway aforesaid, unlawfully, wantonly, and maliciously force said cart against the said chaise, and thereby overturn, with one of the wheels of said cart, the said chaise in which the said C. D. then was as aforesaid, by means whereof he the said C. D. was then and there grievously hurt, bruised, and wounded, and other wrongs then and there did and committed, to the great damage of him the said C. D., against, etc. (*Conclude as in book 1, chapter 3.*)

(224) *Assault and beating out an eye.*(m)

That A. B., of in the county of widow (being a person of depraved and malicious disposition), on, etc., with force and arms, at aforesaid, in the county aforesaid, in and upon one C. D. violently did make an assault, and her the said C. D. did then and there beat, wound, and ill-treat, and that she the said A. B., with her right hand, the said C. D., in and upon the left eye of her the said C. D., then and there unlawfully, violently, and maliciously did strike, by means whereof the said C. D., then and there, the use, sight, and benefit of her said left eye entirely lost and was deprived of; and also, by means of the premises, she the said C. D. became weak

(l) Davis's Prec. 57.

(m) 3 Chit. C. L. 822; Davis's Prec. 55.

and sick, and remained so weak and sick from thence until the day of taking this inquisition; and other wrongs then and there did and committed, to the great damage of the said C. D., against, etc. (*Conclude as in book 1, chapter 3.*)

(225) *Assault and riding over a person with a horse.*(n)

That A. B., of in the county of laborer, on, etc., at B. aforesaid, in the county aforesaid, in and upon the body of one C. D. an assault did make, and him the said C. D. did then and there beat, wound, and abuse; and that the said A. B. did then and there, unlawfully, maliciously, and with great force and violence, ride and drive a certain horse, then and there under the guidance and command of him the said A. B., against, upon, and over the body of the said C. D., whereby the said C. D. was then and there grievously wounded and bruised, and his life thereby greatly endangered, and other wrongs then and there did and committed, to the great damage of him the said C. D., against, etc. (*Conclude as in book 1, chapter 3.*)

(226) [*For assaults on a pregnant woman, see supra, "Abortion,"*
204, etc.]

(227) *Assault by administering cantharides to prosecutrix.*(o)

That (defendant), on, etc., at, etc., in and upon one E. J. did make an assault, and then and there did unlawfully and maliciously administer and cause to be administered to and taken by the said E. J. a large quantity, that is to say, two scruples, of cantharides, the same being then and there a deleterious and destructive drug, with intent thereby to injure the health of the said E. J., and the said E. J. became in consequence thereof sick, sore, and diseased, and disordered in her body, insomuch that her life was greatly despaired of, etc. (*Conclude as in book 1, chapter 3.*)

(*Add count for common assault.*)

(n) 3 Chit. C. L. 823; Davis's Prec. 58.

(o) This count was sustained in *R. v. Button*, 8 C. & P. 660. See *supra*, 138a.

(228) *Assault with intent to kill an infirm person, by throwing him on the ground and beating him.*(p)

That A. N., late of the county aforesaid, laborer, with force and arms, at and in the county aforesaid, in and upon A., a man of color, then and there being a deformed person, and, by reason of his being such a deformed person, being unable to walk or otherwise to move himself from place to place, and also then and there being deficient in voice, so as to be unable to call aloud, and in the peace of God and of the people of the state of Illinois then and there also being, unlawfully did make an assault, and then and there forced and threw the said A. from a certain wagon, in which the said A. then and there was, to and upon the ground, the said ground then and there being frozen and very cold, and then and there did force and compel the said A. (so being such deformed person as aforesaid, and also, by reason of his being such deformed person, being unable to move himself from place to place as aforesaid, and also being deficient in voice, so as to be unable to call aloud as aforesaid) then and there to lie upon the ground, so being frozen and very cold as aforesaid, and then and there did abandon and leave him the said A., lying on the ground as aforesaid, to the great pain and torture of the said A., and to the great damage and

(p) *Nixon v. People*, 2 Scam. 267. On this case Browne, J., said: "This was an indictment to commit murder, upon which Nixon was tried at the last April term of the White Circuit Court, and found guilty; and a motion made in arrest of judgment, which was overruled.

"The errors assigned bring into full view such parts of the record as require particular attention from the court, and are as follows: 1. The facts set forth in the indictment below do not constitute the offence with which said Nixon was charged. 2. The indictment does not sufficiently describe the place where Adam was abandoned, so as to show that death would probably have been caused by such abandonment. 3. The indictment does not sufficiently set forth the means by which the offence charged was committed. 4. The court erred in refusing the motion for a new trial.

"This indictment was brought under a statute of this State (R. L. 180, § 52; Gale's Stat. 206), which provides, that an assault with an intent to commit murder shall subject the offender to confinement in the penitentiary for a term not less than one year, nor more than fourteen years. This indictment has every ingredient necessary to constitute a good one, under this statute. The offence is well set out. There may be a thousand forms of deaths by which human nature may be overcome, by poisoning, starving, drowning, etc. This differs from most cases of assault with intent to commit murder; it is more malignant, and discovers more depravity. But if one assault with intent to commit murder differs from another, it makes it no less a crime. This one seems to be of a very atrocious character."

impoverishment of his health and strength of body, with intent him the said A., by the means aforesaid, then and there feloniously, wilfully, and of his malice aforethought, to kill and murder, and other wrongs to him the said A. then and there did, to the great damage of him the said A., against, etc. (*Conclude as in book 1, chapter 3.*)

(229) *For throwing corrosive fluid, with intent, etc.*(q)

The jurors, etc., upon their oath present, that C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord with force and arms, at B. aforesaid, in the county aforesaid, in and upon one A. B. did make an assault, and then and there unlawfully and maliciously did cast and throw upon the said A. B. a certain corrosive fluid, to wit, one pint of oil of vitriol, with intent in so doing, then and there and thereby the said A. B. to burn, and the said A. B. thereby then and there did grievously burn, against, etc. (*Conclude as in book 1, chapter 3.*)

(230) [*See for "Assaults with intent," etc., infra, 242 et seq., 1046 et seq.*]

(231) *Assault with beating and wounding on the high seas.*

The jurors of the said United States, within and for the said district, upon their oath present, that C. W. C., mariner, and C. G. A., both late of Nantucket, in said district, on, etc., in and on board of a certain ship or vessel called the "J. M." then lying within the jurisdiction of a foreign state or sovereign, to wit, in the port of Paita, in Peru, the said "J. M." then and there being an American ship or vessel belonging to certain persons, citizens of the United States, whose names to the jurors aforesaid are as yet unknown, with force and arms, an assault did make in and upon one T. B., and him the said B. then and there, from malice, hatred, and revenge, and without justifiable cause, did beat and wound, he the said C. then and there being the chief mate of said ship or vessel, he the said A. then and there being the third mate of said ship or vessel, and he the

(q) Archbold's C. P. (ed. 1853), 537. This is good at common law. See also *R. v. Crawford*, 1 Den. C. C. 100, 2 C. & K. 129, for assault by throwing of boiling water.

said B. then and there being one of the crew thereof, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(232) *Assault on high seas, by binding the prosecutor and forcing an iron bolt down his throat.*

And the jurors aforesaid, on their oath aforesaid, do further present, that the said C. W. C. and C. G. A., both late of Nantucket, in said district, on, etc., in and on board of a certain ship or vessel, called, etc., then lying within the jurisdiction of a foreign state or sovereign, to wit, in the port of Paita, in Peru, the said "J. M." then and there being an American ship or vessel belonging to certain persons, citizens of the United States, whose names to the jurors aforesaid are as yet unknown, with force and arms, an assault did make in and upon one T. B., and him the said B. then and there, from malice, hatred, and revenge, and without justifiable cause, did bind and imprison, and, being so bound and imprisoned, did force into the mouth and between the teeth of him the said B., with great force and violence, an iron bolt called a pump bolt, and the same bolt did then and there bind and tie in the mouth and between the teeth of him the said B., and by the said forcing of the said bolt into the mouth and between the teeth of said B. did bruise and lacerate the lips and gums of said B., which said forcing of said bolt into the mouth and between the teeth of said B., and so binding and tying the same therein, was a cruel and unusual punishment; he the said B. then and there being one of the crew of the said ship, and they the said C. W. C. and C. G. A. being officers thereof, to wit, the said C. being then and there the first mate, and the said A. being then and there third mate of said ship; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

And the jurors aforesaid, on their oath aforesaid, do further present, that afterwards, to wit, on, etc., the said C. W. C. and C. G. A. were first apprehended in said district of Massachusetts, to wit, at Boston, which was the district in which the said C. and A. were first apprehended after the commission of the offence aforesaid.(r)

(r) See *infra*, 925 *et seq.*, for further forms on this head.

(233) *Stabbing with intent to wound, under Ohio stat. p. 49, § 6.*

That A. B., on the nineteenth day of August, in the year of our Lord one thousand eight hundred and fifty, in the county of Hamilton aforesaid, in and upon one M. N., then and there being, did unlawfully and maliciously make an assault, and with a certain knife, which he, the said A. B., then and there in his right hand had and held, him, the said M. N., did then and there unlawfully and maliciously stab, thereby, then and there, giving to him, the said M. N., in and upon the right shoulder of him, the said M. N., one wound, of the length of one inch, and of the depth of two inches, with intent then and there him, the said M. N., maliciously to wound, contrary, etc. (*Conclude as in book 1, chapter 3.*)(s)

(234) *Shooting with intent to wound under Ohio stat. p. 49, § 6.*

That A. B., on the twenty-second day of June, in the year of our Lord one thousand eight hundred and fifty-three, in the county of Licking aforesaid, with a certain pistol, then and there, loaded with gunpowder and other destructive materials, which said pistol he, the said A. B., then and there in his right hand had and held, at and against a certain person to the deponent [*or jurors, as the case may be*] aforesaid unknown, then and there feloniously and maliciously did shoot, with intent then and there and thereby, feloniously and maliciously, the said person to the deponent unknown to wound, contrary, etc. (*Conclude as in book 1, chapter 3.*)(t)

(235) *Assault on high seas with dangerous weapon.*

That late of the city and county of New York, in the district aforesaid (*state occupation*), heretofore, on, etc., with force and arms, on the high seas, out of the jurisdiction of any particular state of the said United States of America, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the be-
longing in whole or in part to a citizen or citizens of the said

United States, whose name or names are to the said jurors unknown, with a dangerous weapon, to wit, with a (*state particularly the weapon and dimensions of the same*), in and upon one _____ in the peace of God and of the said United States, then and there being in and on board of said _____ called the _____ feloniously did commit an assault, to the great damage of the said _____ against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said _____ heretofore, on, etc., in and on board of a certain American vessel, being a _____ called the _____ then and there belonging and appertaining to a certain person or persons, then and still being a citizen or citizens of the said United States, whose name or names are to the said jurors unknown, with force and arms, on the high seas, in and on board said _____ out of the jurisdiction of any particular state of the said United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, with a dangerous weapon, to wit, with a (*repeat description and dimensions as in first count*), in and upon one _____ belonging to the company of said vessel, being a _____ called the _____ in the peace of God and of the said United States, then and there being _____ feloniously did make an assault, he the said _____ being one of the company of the said _____ to the great damage of the said _____ against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

Like second count, inserting after "being one of the company of the said _____," and before "to the great damage of the said _____," "and other wrongs to the said _____ then and there did."

Last count.

And the jurors aforesaid, on their oath aforesaid, do further present, that the Southern District of New York (*or otherwise*), in the Second Circuit, is the district and circuit in which the said _____ was first apprehended for the said offence.

(236) *Another form for same.*

That late of the city and county of New York, in the circuit and district aforesaid, heretofore, to wit, on, etc., with force and arms, on the high seas (*or, as the case may be*), on waters within the admiralty and maritime jurisdiction of the United States of America, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, in and on board of a certain vessel, being a called the belonging and appertaining to a certain person or persons, whose names are to the said jurors unknown, then and still being a citizen or citizens of the United States of America, with a dangerous weapon, called a (*describe the dimensions*), in and upon one in the peace of God and of the said United States, then and there being, feloniously did make an assault, and other wrongs to the said then and there did, to the great damage of the said against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said late of the city and county of New York, in the circuit and district aforesaid, heretofore, to wit, on, etc., with force and arms, on the high seas, on waters within the admiralty and maritime jurisdiction of the United States of America, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, in and on board of a certain vessel, being a called the belonging and appertaining to a certain person or persons, whose names are to the said jurors unknown, then and still being a citizen or citizens of the United States of America, with a dangerous weapon, called a (*describe as before*), in and upon one in the peace of God and of the said United States, then and there being, and also then and there being master (*or otherwise*) of the said vessel, being a called the feloniously did make an assault, and other wrongs to the said then and there did, to the great damage of the said against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Last count.

And the jurors aforesaid, on their oath aforesaid, do further present, that the Southern District of New York, in the Second Circuit, is the circuit and district into which the said was first brought, and in which he was first apprehended for the said offence.

(237) *The same, in a foreign port, the weapon being a Spanish knife.*

That heretofore, to wit, on, etc., on board of a certain vessel, to wit, the brig "Volta," belonging to a citizen and citizens of the United States, whose name or names are to this inquest unknown, while lying in a port, to wit, the port of Rio de Janeiro, within the jurisdiction of a foreign state, to wit, of Brazil, to wit, at the Eastern District of Pennsylvania aforesaid, and within the jurisdiction of this court, a person, to wit, one S. T., then and there being a person belonging to the company of the said vessel, did then and there, with a dangerous weapon, to wit, a Spanish knife, commit an assault on another person, to wit, one W. A. R., then and there belonging to the company of the said vessel, and other wrongs to him the said W. A. R., he the said S. T., then and there unlawfully, violently, and maliciously did, to the great damage of him the said W. A. R., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(238) *Second count, same as first, charging the instrument as follows:—*

"With a dangerous weapon, to wit, a sharp cutting instrument."

(239) *Third count. Assault with intent to kill.*

That at, etc., on, etc., on board of a certain vessel, to wit, the brig "Volta," belonging to a citizen and citizens of the United States, while lying in a port, to wit, the port of Rio de Janeiro, within the jurisdiction of a foreign state, to wit, of Brazil, to wit, at the Eastern District of Pennsylvania aforesaid, and within the jurisdiction of the court aforesaid, a person, to wit, one S. T., then and there being a person belonging to the company of the said vessel, did then and there, with intent to kill a person, to

wit, one W. A. R., then and there belonging to the company of the said vessel, did then and there commit an assault on the said W. A. R., then and there belonging to the company of said vessel as aforesaid, and other wrongs to him the said W. A. R., he the said S. T., then and there unlawfully, violently, wickedly, and maliciously did, to the great damage of him the said W. A. R., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*Final count as 17, 18, 171.*) (*u*)

(240) *Assault and false imprisonment at common law.*(*v*)

That J. S., late of the parish of B., in the county of M., laborer, on, etc., with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one J. N., in the peace of God and of the said state, then and there being, did make an assault, and him the said J. N., then and there unlawfully and injuriously, and against the will of the said J. N., and also against the laws of this state, and without any legal warrant, authority, or reasonable or justifiable cause whatsoever, did imprison, and detain so imprisoned there, for a long space of time, to wit, for the space of ten hours then next following,* and other wrongs

(*u*) In 17 and 18 the final counts are given in cases where the offender was either first brought or first apprehended within the particular district in which the indictment is found. These counts, one of which is necessary in all cases where the offence was committed within mere admiralty jurisdiction, are varied in phraseology in the several circuits, and would seem, in fact, with their several modifications, to be used indiscriminately in cases where the offender is either first brought or first apprehended, etc. The following forms, in addition to those in the text, are of frequent occurrence:—

That afterwards, to wit, etc., the said A. B. was first brought into S. in said district, and that the said district of M. is the district into which he was first brought after committing the offence aforesaid.

That the southern district of New York is the district in which the said A. B. was first brought and apprehended for the said offence.

That the said A. B., etc., after the commission of the said offence, to wit, on, etc., was first brought into the said M. district, and that the said M. is the district into which the said offender was first brought as aforesaid. *Davis's Prec.* 224.

That the said C. D., the offender aforesaid, was first brought into B. aforesaid, in the district of after the commission of said offence, and that the said district of is the district into which he was first brought. *Lewis's C. L.* 645.

See, for other forms of same, 177, 178, 179, 180.

Where the offender is out of the jurisdiction, and the bill is found for the purpose of issuing a bench warrant, of course the final count is to be omitted.

(*v*) *Arch. C. P.* 5th Am. ed. 558.

to the said J. N. then and there did, to the great damage of the said J. N., and against, etc. (*If any money were extorted from the prosecutor for setting him at liberty, add an averment of it immediately after the above asterisk, as thus*): And until he the said J. N. had paid to the said J. S. the sum of five dollars of the moneys of the said J. N., for his enlargement; and other wrongs, etc. (*Add a count for a common assault.*)

(241) *Assault and false imprisonment, with the obtaining of five dollars. (If there be no extortion, the averment in brackets can be omitted.)(w)*

That A. B., of, etc., on, etc., at, etc., with force and arms, in and upon one E. F. did make an assault, and him the said E. F. then and there unlawfully and injuriously, and against the will and without the consent of the said E. F., and also against the laws of this state, without any legal warrant, authority, or justifiable cause whatsoever, did imprison and detain for a long time, to wit, for the space of hours then next following [and until he the said E. F. had paid to him the said A. B. the sum of five dollars, lawful money of the United States, of the moneys of the said E. F., for his enlargement], and other wrongs to the said E. F. then and there did, to the great damage of the said E. F., against, etc. (*If a note was obtained instead of a sum of money, insert instead of the above passage in brackets*): And until he the said E. F., for his delivery from the said imprisonment, had signed and given to the said A. B. a note under the hand of the said E. F., whereby he the said E. F. promised to pay to the said A. B. the sum of ten dollars, etc.

(242) *Assault with intent to commit murder or other felony at common law.(x)*

That A. B., etc., on, etc., at, etc., with a certain drawn sword, which he the said A. B. in his right hand then and there had

(w) Stark. C. P. 428.

(x) Where an assault is duly averred, then the intent with which this assault was committed is matter of surplusage, and need not be proved in order to secure a conviction of the assault. *R. v. Higgins*, 2 East, 5; though see *R. v. Marsh*, 1 Den. C. C. 505; Wh. Cr. L. 8th ed. § 637. Even an assault with intent need not specify the facts necessary to constitute an offence whose actual and complete shape was not at the time matured. Thus an indictment for an assault with an intent to steal from the pocket, without stating the goods or money in-

and held, in and upon one S. W. did feloniously, wilfully, and of his malice aforethought,^(y) with an intent him the said S.^(z) then and there, feloniously, wilfully, and of his malice aforethought,^(a) to kill and murder,^(b) and other wrongs to the said S. W. then and there did, against, etc.^(c)

(243) *Another form for same, in New York.*

That at on, etc., with force and arms, to wit, with knives, hatchets, and tomahawks, in and upon one E. G., of etc., in the peace of the people, then and there being, did make

tended to be stolen, is good. *Com. v. Rogers*, 5 S. & R. 463; *Wh. Cr. L.* 8th ed. § 637. Nor is it necessary to aver that the prosecutor had anything in his pocket to be stolen. *Com. v. McDonald*, 5 Cush. 365. See *Com. v. Doherty*, 10 Cush. 52. *Dickerson v. Com.*, 2 Bush, 1; *Taylor v. Com.*, 3 Bush, 508. In an indictment, also, for an assault with intent to murder, it is not necessary to state the instrument or means made use of by the assailant to effectuate the murderous intent. *U. S. v. Herbert*, 5 Cranch C. C. 87; *State v. Daley*, 41 Vt. 564; *State v. Dent*, 3 Gill & John. 8; *Rice v. People*, 15 Mich. 9; *Kilkelly v. State*, 43 Wis. 604; but see *State v. Johnson*, 11 Tex. 22; *State v. Jordan*, 19 Mo. 213; *Trexler v. State*, 19 Ala. 21; *State v. Chandler*, 24 Mo. 371; *State v. Hubbs*, 58 Ind. 415. See fully *Wh. Cr. L.* 8th ed. § 644. The question, it is to be observed, depends on the statute constituting the offence. See *State v. Munch*, 22 Minn. 67. In an indictment for breaking and entering a dwelling-house, with intent to commit a rape, it need not be alleged that the defendant "then and there" intended to commit the rape, nor need the offence of rape be fully and technically set forth. *Com. v. Doherty*, 10 Cush. 52. The means of effecting the criminal intent, and the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment (*Mackesey v. People*, 6 Park. C. R. 114; *State v. Dent*, 3 Gill & J. 8; approved in *U. S. v. Simmons*, 96 U. S. 360; citing also *U. S. v. Gooding*, 12 Wheat. 473; *U. S. v. Uriel*, 3 Dillon, 535); though when an attempt is averred, it is necessary that some act constituting such attempt (*e. g.* an assault) should be laid. *Randolph v. Com.*, 6 S. & R. 398; *Clark's case*, 6 Grat. 675. See *State v. Wilson*, 30 Conn. 503. See, as tending to a laxer view, *U. S. v. Simmons*, 96 U. S. 360; *People v. Bush*, 4 Hill N. Y. 132. As to precision necessary in indictments for attempts, etc., see *Wh. Cr. L.* 8th ed. §§ 173 *et seq.*, 190. The attempt is not *per se* indictable, and needs extraneous facts to make it the subject of an indictment, while it is otherwise with an assault. In such cases the term feloniously must ordinarily be used when the object is felonious.

(y) As to repetition of these terms see *Wh. Cr. L.* 8th ed. § 260; *State v. Howell*, Ga. Dec. Pt. I. 158; *State v. Wilson*, 7 Ind. 516; *U. S. v. Gallagher*, 2 Paine, C. C. 447.

(z) This repetition of the name of the injured party is necessary. *State v. Patrick*, 3 Wis. 812.

(a) This is generally necessary. *State v. Harris*, 34 Mis. 347; *State v. Davis*, 26 Tex. 201; *People v. English*, 30 Cal. 214; *People v. Congleton*, 44 Cal. 92; see *State v. Phinney*, 42 Me. 384. See *State v. Murphy*, 21 Ind. 441. The word "unlawfully" may be omitted. *Ib.*

(b) "To commit manslaughter" is here inadequate. *Bradley v. State*, 10 S. & M. 618.

(c) For assault with intent to kill, in the United States courts, see *supra*, 239.

an assault, and with intent to commit murder on the said E. G., did then and there cut, beat, strike, wound, and evil treat him the said E. G., and other wrongs to the said E. G. then and there did, to the damage of the said E. G., and against, etc.(*d*) (*Conclude as in book 1, chapter 3.*)

(244) *Assault with intent to drown.(e)*

That A. B., of in the county of laborer, on with force and arms, at in the county aforesaid, in and upon the body of one C. D., with a dangerous weapon, to wit, with a large stick, which he the said A. B. in both his hands then and there had and held, did make an assault, and him the said C. D. did then and there beat, wound, and abuse; and that he the said A. B., with both his hands, did then and there unlawfully, violently, and maliciously cast, push, and throw the said C. D. into a certain pond there situate and being, wherein there was a large quantity of water, and did then and there keep, press down, and confine the said C. D. in and under the said water for the space of five minutes, with intention him the said C. D. then and there feloniously, wilfully, and of his malice aforethought, to suffocate and drown in the said water; and him the said C. D., by means thereof, wilfully, feloniously, and of his malice aforethought, to kill and murder; and other wrongs to the said C. D. then and there did, to the great damage of him the said C. D., against, etc. (*Conclude as in book 1, chapter 3.*)

(*d*) *People v. Pettit*, 3 Johns. R. 511. This indictment was attacked, 1st, because it did not charge the offence to have been committed feloniously; 2d, because the instruments were not accurately described; and 3d, because the intent was not set out with sufficient precision. "*Per curiam*: The intent to commit murder was here charged in the words of the statute, and we think that was sufficient. The indictment is for an assault and battery, and the *quo animo* is to be collected from the circumstances. It was enough to state, with the usual precision, the facts requisite to constitute an assault and battery, and to aver the intent with which it was made. The indictment required no other facts than were necessary to establish an assault and battery. The crime charged was, after all, but a misdemeanor. It was not a felony, though the intent was to commit one." This indictment, however, is defective at common law, and only good when sustained by local statute. See 243 and notes.

(*e*) *Davis's Prec.* 66.

(245) *Assault with intent to murder, under the New York Rev. Stat.*

That E. L., late of the First Ward of the city of New York, in the county of New York aforesaid, laborer, on the day of in the year, etc., with force and arms, at the ward, city, and county aforesaid, in and upon N. J., then and there being, feloniously did make an assault, and him the said N. J., with a certain knife, which the said E. L. in his right hand then and there had and held (the said knife being a deadly weapon), feloniously did beat, strike, cut, and wound, with intent him the said N. J. then and there feloniously and wilfully to kill, and other wrongs to the said N. J. then and there did, to the great damage of the said N. J.; against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(246) *Second count. With intent to maim.*

That the said E. L., on the said day of in the year last aforesaid, with force and arms, at the ward, city, and county aforesaid, in and upon the said N. J., then and there being, feloniously did make another assault, and him the said N. J., with a certain knife, which he the said E. L. in his right hand then and there had and held, the said knife being a deadly weapon, feloniously did beat, strike, cut, and wound, with intent him the said N. J. then and there feloniously and wilfully to maim, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(247) *Assault with intent to commit a felony generally.(f)*

That A. B., etc., at, etc., aforesaid, in and upon one J. N., in the peace of God and of our lady the queen, then and there being, unlawfully did make an assault, and him the said J. N. then and there did beat, wound, and ill-treat, [with intent(g) (*here state*

(f) This form is given by Mr. Archbold, C. P. 5th Am. ed. 544, as good under the stat. 9 Geo. IV. c. 31, s. 25, which enacts, that any person who shall be convicted "of any assault to commit felony," shall be punished, etc. As will be seen by a comparison of this statute with that in New York (2 Rev. Stat. 665, 666, § 39), the indictment in the text will be good in that state in the particular cases provided for. As a rule, it is enough to state the intent generally. See notes to 242.

(g) If necessary the intent and all that follows in brackets may be discharged as surplusage. Wh. Cr. L. 8th ed. §§ 641a, 645; Wh. Cr. Pl. & Pr. §§ 249, 251, and cases cited.

the felony intended thus): him the said J. N. then and there feloniously, wilfully, and of his malice aforethought, to kill and murder,] and other wrongs to the said J. N. then and there did, to the great damage of said J. N.; against the form of the statute in such case made and provided, and against, etc. (*Add a count for common assault.*)

(248) *Felonious assault under the Massachusetts statute.*(h)

That A. B., of B. aforesaid, yeoman, on, etc., at B. aforesaid, with force and arms, the said A. B. then and there being armed with a dangerous weapon, to wit, a sword, in and upon one E. F., then and there, in the peace of said commonwealth being, feloniously, wilfully, and of his malice aforethought, an assault did make, with intent him the said E. F. to, etc., and by so doing, and by force of the statute in such case made and provided, he the said A. B. is deemed a felonious assaulter. And so the jurors aforesaid, on their oath aforesaid, do say and present, that the said A. B., at B. aforesaid, on, etc., with force and arms, feloniously assaulted the said E. F., in manner and form aforesaid, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(248a) *Assault with intent to murder with pistol, under Massachusetts statute.*

That H. M. F., etc., on, etc., at, etc., in and upon one J. B. H., with a certain dangerous weapon, to wit, with a pistol, then and there loaded with powder and leaden ball, with which dangerous weapon the said H. M. F. was then and there armed, feloniously, wilfully, and of his malice aforethought did make an assault, with intent the said J. B. H. then and there, with the pistol aforesaid, feloniously, wilfully, and of his malice aforethought to kill and murder.(i)

(h) An assault with an intent to murder was not a felony under the statute, and consequently the word "feloniously" should not be admitted, and this though the statute provides that the defendant shall be deemed a felonious assaulter. *Com. v. Barlow*, 4 Mass. 439. It would seem, however, that if the term be improperly used, it may be rejected as surplusage. *Com. v. Squire*, 1 Met. 258. *Wh. Cr. L.* 8th ed. §§ 641a, 645. But now, by stat. 1852, ch. 37, it is felony. See *Com. v. Chapman*, 11 Cush. 422.

(i) *Com. v. Fenno*, 125 Mass. 387.

(248b) *Shooting in Indiana.*

That J. A., on, etc., at, etc., did feloniously attempt to commit a violent injury upon the person of D. C. H., he, the said J. A., having then and there a present ability to commit said injury, by then and there feloniously, purposely, and with premeditated malice, shooting at and against the said D. C. H. with a certain pistol, commonly called a revolver, then and there loaded with gunpowder and leaden balls, which the said J. A. then and there in both his hands had and held, with intent then and there and thereby him, the said D. C. H., feloniously, purposely, and with premeditated malice to kill and murder.(j)

(249) *Assault with intent to murder in South Carolina.*

That A. B., on, etc., with force and arms, at in the district of and state aforesaid, in and upon E. F., in the peace of God and of the said state aforesaid, then and there being, did make an assault, and him the said E. F. did, etc., with intent him the said E. F. then and there feloniously, wilfully, and of his malice aforethought, to kill and murder, and other wrongs to the said E. F. then and there did, to the great damage of the said E. F., and against, etc. (*Conclude as in book 1, chapter 3.*)

(249a) *Assault with intent to murder, under Indiana statute.*

The grand jurors in, etc., . . . upon their oath do present, that C. R. McC. on, etc., at, etc., did then and there unlawfully and feloniously attempt to commit a violent injury upon the person of one R. R. P.; he, the said C. R. McC., was then and there a person of sound mind, and did then and there have a present ability to then and there commit said violent injury; that is, he, the said C. R. McC., did then and there unlawfully, feloniously, purposely, and with premeditated malice, shoot, fire, and discharge toward, at, and against the body of said R. R. P. one certain pistol, revolver, and gun, which he, the said C. R. McC., then and there had and held in his hands, and which said pistol, revolver, and gun was then and there loaded and charged with cartridge, gunpowder, leaden balls, shot, and

bullets, and the said C. R. McC., with said pistol, revolver, and gun, so loaded and charged as aforesaid, and in his, the said C. R. McC.'s, hands so had and held as aforesaid, did then and there shoot, fire, and discharge said pistol, revolver, and gun at, toward, and against the body and person of the said R. R. P., with the intent then and there and thereby him, the said R. R. P., unlawfully, feloniously, purposely, and with premeditated malice to kill and murder.(k)

Another form.

The grand jurors of, etc., good and lawful men, duly and legally empanelled, sworn, and charged in, etc., at, etc., to inquire in and for the body of said county, in the name and by the authority of, etc., upon their oath present and charge, that on, etc., and in, etc., W. A. J., in and upon one O. B. S., did then and there unlawfully, feloniously, purposely, and with premeditated malice, make an assault, and then and there, at and against, and in contact with, the said O. B. S., did feloniously, purposely, and with premeditated malice, shoot a certain pistol, then and there loaded with gunpowder and leaden balls, which he, the said W. A. J., then and there in his hands had and held, with the intent then and there him, the said O. B. S., feloniously, purposely, and with premeditated malice, to kill and murder.(l)

(k) Howk, J. "The appellant's learned attorneys do not, however, as we understand them, controvert the sufficiency of the indictment in this case, to state a public offence. But they claim, and to this point they have directed much of their elaborate argument in this court, that the indictment charged the appellant with an assault and battery, and not merely with an assault with the intent to commit murder. We think that this point is not well taken." *McCully v. State*, 62 Ind. 428.

(l) It was held that this indictment was not open to the objection of duplicity. *Jones v. State*, 60 Ind. 241.

In *Jarrell v. State*, 58 Ind. 293, the first count charged that "H. J. on, etc., at, etc., did then and there unlawfully, feloniously, purposely, and with premeditated malice, in a rude, insolent, and angry manner, unlawfully touch, strike, beat, and wound one J. H. G., by then and there unlawfully, purposely, feloniously, and with premeditated malice, shooting said J. H. G. with a certain pistol, which said pistol was then and there loaded with gunpowder and leaden balls, and which said pistol he, the said H. J., in his hand then and there held, with intent then and there and thereby him, the said J. H. G., unlawfully, purposely, feloniously, and with premeditated malice, to kill and murder, contrary," etc. The second count charged "that on, etc., at, etc., H. J. did then and there unlawfully and feloniously make an assault upon one J. H. G., and him the said J. H. G. in a rude, insolent, and angry manner, did then and

(250) *Felonious assault with intent to rob, being armed. Rev. Sts. of Mass. ch. 125, § 14.*

That C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord with force and arms, at B. aforesaid, in the county aforesaid, the said C. D. being then and there armed with a certain dangerous weapon, to wit, an axe, in and upon one J. N. feloniously, and with force and violence, did make an assault, with intent the moneys, goods, and chattels of the said J. N., from the person and against the will of the said J. N., then and there feloniously, and by force and violence, and by assault and putting in fear, to rob, steal, take, and carry away; against the peace, etc., and contrary to the form, etc.

(250a) *Assault with intent to rob, under English statute.*

— in and upon one J. N. feloniously did make an assault, with intent the moneys, goods, and chattels of the said J. N., from the person and against the will of him, the said J. N., then feloniously and violently to steal, take, and carry away, against, etc.(m)

(251) *Assault with intent to rob, against two.(n)*

That (the prisoners), on, etc., at, etc., in and upon R. B., in the peace of God and our said lady the queen, then and there being,

there unlawfully and feloniously touch, strike, beat, and wound, by then and there shooting at and against the said J. H. G., with a certain pistol, which said pistol he the said H. J. then and there had and held in his hand, and which said pistol was then and there loaded with gunpowder and leaden balls, with intent then and there and thereby him, the said J. H. G., unlawfully, feloniously, maliciously, and with premeditated malice to kill and murder, contrary," etc. The sufficiency of the indictment being before the supreme court, it was said by Perkins, J.: "The objection to the first count is, that, while it avers that J. wounded G. by shooting him with a pistol, it does not aver that he hit him. Our statute enacts, that 'words and phrases will be taken in their plain, or ordinary, and usual sense. But technical words and phrases having a peculiar and appropriate meaning in law should be understood according to their technical import.' 2 R. S. 1876, p. 315.

"The word 'shooting' is not a technical word, and, in its usual sense, the phrase 'shooting a person' means that the person was hit by the substance with which the gun or pistol was loaded." The first count in the indictment was held good.

(m) Arch. C. P. 19th ed. p. 458, where it is said that this form was approved in *R. v. Huxley*, 1 C. & M. 596.

(n) *R. v. Huxley*, 1 C & M. 596, where this form was sustained by Patteson and Creswell, JJ

feloniously did together make an assault with intent the moneys, goods, and chattels of the said R. B., from the person and against the will of him the said R. B., then and there feloniously and violently to rob, steal, take, and carry away, against, etc. (*Conclude as in book 1, chapter 3.*)

(252) *Another form for same.(o)*

That defendants, late of the said county, on, etc., in the county of C. aforesaid, in and upon the person of G. H. G., in the peace of the people of the state of Illinois, then and there being, with force and arms, did make an assault, with an intent, then and there, unlawfully, wilfully, and feloniously to commit a robbery, and other wrongs to the said G. H. G. did, then and there, etc.

(253) *Assault with intent to ravish.(p)*

That A. B., etc., on, etc., at, etc., on one E. F. did make an assault, and her the said E. F. then and there did beat, wound, and ill-treat, so that her life was greatly despaired of, with an intent her the said E. F., against her will, then and there feloniously to ravish(*q*) and carnally know, and other wrongs to her the said E. F. then and there did, against, etc. (*Conclude as in book 1, chapter 3.*)

(254) *Same under Rev. Sts. of Mass.ch. 125, § 19.*

That C. D., late of B., in the county of S., laborer, on the first day of June in the year of our Lord with force and arms, at B. aforesaid, in the county aforesaid, in and upon one J. N. feloniously did make an assault, with intent the said J. N. then and there feloniously to ravish and carnally know, by force and against her will ; against the peace, etc., and contrary, etc.

(*o*) *Conolly v. State*, 3 Scam. 477. This form, though very loose, was sustained.

(*p*) *Stark. C. P.* 429. "If the offence of rape," remarks Mr. Starkie, "appears to have been actually committed, the prisoner should be acquitted, since the misdemeanor merges in the felony. See *East, P. C.* 411." But see *Wh. Cr. L.* 8th ed. §§ 576, 1343. As to propriety of joining this count with a count for rape, see *Ib.* 8th ed. § 570. For other points see, *supra*, notes to form 242.

(*q*) This is essential. Means *v. Com.*, 2 Grant, 385. An indictment for an assault with intent to commit a rape need not allege that the intent was to "carnally and unlawfully know." *Singer v. People*, 13 Hun, 418, aff. 75 N. Y. 608.

(255) *Assault with intent to ravish under Ohio stat. p. 48, § 4.(r)*

That A. B., late of the county aforesaid, on the twenty-first day of August, in the year of our Lord one thousand eight hundred and thirty-six, in the county of Montgomery aforesaid, in and upon one M. N., then and there being, did unlawfully make an assault, and her the said M. N. then and there did beat, wound, and ill-treat, with intent her the said M. N. violently, forcibly, and against her will, then and there, unlawfully and feloniously to ravish and carnally know, to the great damage of the said M. N.; contrary, etc. (*Conclude as in book 1, chapter 3.*)

(256) *Another form for assault with intent to ravish.(s)*

That W. S., of the county aforesaid, yeoman, on, etc., at the county aforesaid, and within the jurisdiction of this court, in and upon S. C., spinster, in the peace of God, then and there being, with force and arms, an assault did make, with an intention to ravish and carnally know the said S. C., and the said S. C. did beat, wound, and evilly treat, so that her life was greatly despaired of, and other harms to her then and there did, to the great damage of the said S., and against, etc. (*Conclude as in book 1, chapter 3.*)

(257) *Same against two.(t)*

That A. B., late, etc., and C. D., late, etc., on, etc., at, etc., in and upon E., the wife of one H. S., did make an assault, and her the said E. then and there did beat, wound, and ill-treat, so that her life was greatly despaired of, with intent that he, the said C. D., should then and there feloniously and against the will of the said E., ravish and carnally know her the said E., and that they the said A. B. and C. D. other wrongs to the said E. then and there did, contrary, etc. (*Conclude as in book 1, chapter 3.*) (*Add a count for assault.*)

(r) Warren's C. L. 59.

(s) *Stout v. Com.*, 11 S. & R. 177. The omission of the word "feloniously," which was the first ground of exception to the indictment, was sustained by the court; and the want of an averment of time and place to the concluding allegation, was declared to be immaterial, the time and place named in the first clause qualifying the whole offence.

(t) *Stark. C. P.* 429.

(259) *For an indecent assault.*(u)

The jurors, etc., upon their oath present, that C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord at B. aforesaid, in the county aforesaid, unlawfully and indecently did make an assault in and upon one A. B., and did then and there unlawfully, indecently, and against the will of the said A. B., pull up the clothes of the said A. B., and did then and there unlawfully, indecently, and against the will of the said A. B., put and place the hands of the said C. D. upon and against the private parts of the said A. B. (*stating the indecent acts which will be proved by the evidence*), and other wrongs to the said A. B. then and there did; against, etc. (*Conclude as in book 1, chapter 3.*)

(260) *For an indecent assault with intent to have an improper connection.*(v)

The jurors, etc., upon their oath present, that C. D., later of B., in the county of S., physician, on the first day of June, in the year of our Lord at B., in the county of S., did unlawfully and indecently assault one A. B., and did then and there unlawfully and indecently, and against the will of the said A. B., put and place the private parts of the said C. D. against the private parts of the said A. B., and did then and there otherwise ill-treat and ill-use her; against, etc. (*Conclude as in book 1, chapter 3.*)

(261) *For an indecent assault in stripping.*(w)

The jurors, etc., upon their oath present, that A. B., late of B.,

(u) Tr. & H. Prec. 41.

(v) Tr. & H. Prec. 41; 6 Cox, C. C. Appendix, p. xliii. The later English cases indicate a distinction between an assault with an intent to ravish and an assault with intent to have an improper connection, which makes it important to have a count for the latter in all cases where it is doubtful whether it was intended to consummate the offence by force. Wh. Cr. L. 8th ed. §§ 576 *et seq.*; R. v. Stanton, 1 C. & K. 415; R. v. Saunders, 8 Carrington & Payne, 265; Regina v. Williams, 8 Carrington & Payne, 286. The act, say Train & Heard, being done fraudulently will support the averment that it was against the will of the prosecutrix. This form seems applicable where actual connection has taken place under circumstances involving any legal assault, but no higher offence. See Regina v. Case, 1 Den. C. C. 580; 4 Cox, C. C. 220; 1 Eng. Law & Eq. R. 544; 1 Temple & M. C. C. 318.

(w) 6 Cox, C. C. Appendix, p. xliii. See R. v. Rosinski, 1 Moody, C. C. 19; 1 Lewin, C. C. 11.

in the county of S., laborer, on the first day of June, in the year of our Lord at B., in the county of S., did unlawfully and indecently assault one C. D., and did then and there unlawfully and indecently, and against the will of the said C. D., pull and strip the clothes of the said C. D. from and off the body of the said C. D., and did then and there otherwise ill-treat and ill-use her; against, etc. (*Conclude as in book 1, chapter 3.*)

(262) *Assault with intent to rape—attempting to abuse a female under ten years of age, under Ohio stat. p. 48, § 4.(x)*

That A. B., late of the county of Lawrence aforesaid, on the seventh day of June, in the year of our Lord one thousand eight hundred and fifty, in and upon one M. N., then and there being, unlawfully did make an assault, with an intent, her the said M. N. then and there unlawfully and feloniously to carnally know and abuse, he the said A. B. then and there being a male person of the age of seventeen years and upward, and the said M. N. being then and there a female child under the age of ten years. (*Conclude as in book 1, chapter 3.*)

(263) *Assault with intent to steal.(y)*

That A. B., on, etc., on E., etc., did make an assault, etc., with intent feloniously to steal, take, and carry away the money of the said E. from his person; and that the said A. B. did then and there put his right hand into the pocket of the coat of the said E., on the body of the said E., and other harms then and there did, etc. (*Add a count for an assault.*)

(263a) *Injury to a child by withholding from it food.*

The jurors for, etc., upon their oath present, that F. R., single woman, of, etc., on, etc., was the mother of one M. J. R., an

(x) Warren's C. L. 58.

(y) *Rogers v. Com.*, 5 S. & R. 463. It is not necessary, as was held here, in assault with intent to steal, that the goods stolen should be set out. "The intention of the person was to pick the pocket of Earle of whatever he found in it; and although there might be nothing in the pocket, the intention to steal is the same; he had no intention to steal any particular article, for he might not know what was in it; it would be impossible to lay the intention in any other way than a general intention to pick the pocket of Earle. The crime was the assault, the intention is only aggravation." This question is further considered in the notes to form 242.

infant of tender years, to wit, of the age of five years; and that the said M. J. R. was then and there under the care, dominion, and control of the said F. R., and wholly unable to provide for herself; and that on the day and year aforesaid, and on divers other days and times, as well before as after that day, it was the duty of the said F. R. to protect, shelter, and nourish the said M. J. R., she, the said F. R., being able and having the means to perform and fulfil her said duty; and the jurors aforesaid, upon their oath aforesaid, further present, that the said F. R., well knowing the premises and not regarding her duty in that behalf, on, etc., and on divers other days and times, as well before as after that day, in the borough aforesaid, did unlawfully and wilfully neglect and refuse to find the said M. J. R. with sufficient meat, drink, wearing apparel, bedding, and other necessaries proper and requisite for the sustenance, support, clothing, covering, and resting the body of the said M. J. R., by means whereof the said M. J. R. became weak, sick, and ill, and greatly emaciated in her body, against the peace, etc.(z)

(z) *R. v. Rugg*, 12 Cox, C. C. 16. In this case the jury returned a verdict of guilty, on the ground that, if the prisoner had applied to the guardians for relief, she would have had it. It was held that the count was not proved. For homicide of wife by neglect to provide proper care, see *supra*, 163a.

BOOK IV.

OFFENCES AGAINST PROPERTY.

CHAPTER I.

FORGERY, COINING, UTTERING, ETC.

- (264) General frame of indictment at common law.
- (265) Forgery, at common law, a certificate of an officer of the American army, in 1777, to the effect that he had received certain stores, etc.
- (266) Second count. Publishing the same.
- (267) Forgery. Altering a certificate of an officer of the American army in 1778, to the effect that he had received for the use of the troops at Carlisle certain articles of clothing. Offence laid at common law, the intent being to defraud the United States.
- (268) Forgery. Altering and defacing a certain registry and record, etc., under the Pennsylvania act of 1700.
- (268*a*) Forging will under English statute.
- (268*b*) Making false entry in marriage register.
- (268*c*) Making false entry in baptismal register.
- (269) For forging, etc., a bill of exchange, an acceptance thereof, and an indorsement thereon.
- (270) Second count, for uttering.
- (271) Third count, for forging an acceptance.
- (272) Fourth count, same stated differently.
- (273) Fifth count, for forging an indorsement, etc.
- (274) Sixth count, for publishing a forged indorsement, etc.
- (275) For forgery at common law in antedating a mortgage deed with interest, to take place of a prior mortgage.
- (275*a*) Forgery of note under Indiana statute.
- (276) At common law. Against a member of a dissolved firm for forging the name of the firm to a promissory note.
- (277) Forgery a letter of attorney at common law.
- (278) Forgery of bill of exchange. First count, forging the bill.
- (279) Second count. Uttering the same.
- (280) Third count. Forging an acceptance on the same.
- (281) Fourth count. Offering, etc., a forged acceptance.
- (282) Sixth count. Offering, etc., forged indorsement.

OFFENCES AGAINST PROPERTY.

- (283) Forging and publishing a receipt for payment of money.
- (284) Second count, for uttering.
- (285) Forging a receipt, under the North Carolina statute.
- (286) Forging *feri facias* at common law.
- (287) Second count. Uttering same.
- (288) Forgery of a bond at common law.
- (289) At common law, by separating from the back of a note an indorsement of part payment.
- (290) Forgery in altering a peddler's license, at common law.
- (291) Forgery of a note which cannot be particularly described in consequence of its being destroyed.
- (292) Forgery of a note whose tenor cannot be set out on account of its being in defendant's possession.
- (293) Forgery of bond when forged instrument is in defendant's possession.
- (294) Forgery at common law, in passing counterfeit bank notes.
- (295) Forgery of the note of a foreign bank as a misdemeanor at common law.
- (296) Forging a bank note, and uttering the same, under English statute.
- (297) Second count. Putting away same.
- (298) Third count. Forging promissory note.
- (299) Fourth count. Putting away same.
- (300) Fifth count. Same as first, with intent to defraud J. S.
- (301) Sixth count. Putting away same.
- (302) Seventh count. Same as second, with intent to defraud J. S.
- (303) Eighth count. Putting away same.
- (304) Attempt to pass counterfeit bank note, under Ohio statute.
- (305) Forging a certificate granted by a collector of the customs.
- (306) Causing and procuring forgery, etc.
- (307) Altering generally.
- (308) Altering, etc., averring specially the alterations.
- (309) Same in another shape.
- (310) Uttering certificate as forged.
- (311) Uttering certificate as altered.
- (312) Forging a treasury note.
- (313) Causing and procuring, etc.
- (314) Altering same.
- (315) Passing note, etc.
- (316) Same in another shape.
- (317) Feloniously altering a bank note.
- (318) Having in possession forged bank notes without lawful excuse, knowing the same to be forged.
- (319) Uttering and passing a counterfeit bank bill, under § 4, ch. 99, of Revised Statutes of Vermont.
- (320) Uttering forged order, under Ohio statute.
- (321) Passing same.

FORGERY, COINING, UTTERING, ETC.

- (322) Uttering a forged note purporting to be issued by a bank in another state, under the Vermont statute.
- (323) Having counterfeit bank note in possession, under Ohio statute.
- (324) Having in possession counterfeit plates, under Ohio statute.
- (325) Secretly keeping counterfeiting instruments, under Ohio statute.
- (326) Having in possession counterfeit bank notes, under Ohio statute.
- (327) Having in possession forged note of United States Bank, under the Vermont statute.
- (328) Forgery, etc., in New York. Having in possession a forged note of a corporation.
- (329) . . . Second count. Uttering the same.
- (330) Forging an instrument for payment of money, under the New York statute.
- (331) . . . Second count. Uttering the same.
- (332) Having in possession forged notes, etc., with intent to defraud, under the New York statute.
- (333) Forgery of a note of a bank incorporated in Pennsylvania, under the Pennsylvania statute.
- (334) . . . Second count. Passing same.
- (335) Forgery of the note of a bank in another state, under the Virginia statute.
- (336) For making, forging, and counterfeiting, etc., American coin, under act of congress.
- (337) . . . Second count. Same, averring time of coining.
- (338) . . . Third count. Passing, etc.
- (339) . . . Fourth count. Same in another shape.
- (340) . . . Fifth count. Same, specifying party to be defrauded.
- (341) Counterfeiting half dollars, under act of congress.
- (342) Passing counterfeit half dollars, with intent to defraud an unknown person, under act of congress.
- (343) . . . Second count. Same, with intent to defraud R. K.
- (344) Having coining tools in possession, at common law.
- (344a) Having die for counterfeiting in possession.
- (345) Making, forging, and counterfeiting, etc., foreign coin, quarter dollar, under act of congress.
- (346) . . . Second count. Procuring forgery.
- (347) Passing, uttering, and publishing counterfeit coin of a foreign country, under act of congress, specifying party to be defrauded.
- (348) Debasement of the coin of the United States, by an officer employed at the mint, under act of congress.
- (349) Fraudulently diminishing the coin of the United States, under act of congress.
- (350) Uttering a counterfeit half guinea, at common law.
- (351) Passing counterfeit coin similar to a French coin, at common law.
- (352) Counterfeiting United States coin, under the Vermont statute.
- (353) Having in possession coining instruments, under the Rev. Sts. of Massachusetts, ch. 127, § 18.

- (354) Having in possession ten counterfeit pieces of coin, with intent to pass the same, under Rev. Sts. of Mass. ch. 127, § 15.
- (355) Having in custody less than ten counterfeit pieces of coin, under Rev. Sts. of Mass. ch. 127, § 16.
- (356) Uttering and publishing as true a forged promissory note. Rev. Sts. of Mass. ch. 127, § 2.
- (357) For forging a promissory note. Rev. Sts. of Mass. ch. 127, § 1.
- (358) For counterfeiting a bank bill. Rev. Sts. of Mass. ch. 127, § 4.
- (359) For having in possession at the same time, ten or more counterfeit bank bills, with intent to utter and pass the same as true. Rev. Sts. of Mass. ch. 127, § 5.
- (360) Passing a counterfeit bank bill. Rev. Sts. of Mass. ch. 127, § 6.
- (361) Having in possession a counterfeit bank bill, with intent to pass the same. Rev. Sts. of Mass. ch. 127, § 8.
- (362) Making a tool to be used in counterfeiting bank notes. Rev. Sts. of Mass. ch. 127, § 9.
- (363) Having in possession a tool to be used in counterfeiting bank notes, with intent to use the same. Rev. Sts. of Mass. ch. 127, § 9.
- (364) Counterfeiting current coin. Rev. Sts. of Mass. ch. 127, § 15.
- (365) Uttering and passing counterfeit coin. Rev. Sts. of Mass. ch. 127, § 16.
- (366) Coining, etc., under the North Carolina statute.

(264) *General frame of indictment at common law.*(a)

That, etc., on, etc., falsely and fraudulently did forge and counterfeit,(b) [and cause and procure to be forged and counterfeited],(c) a certain promissory note for the payment of money, purporting to be made by one A. B., payable on demand to one C. D.,(d) the tenor of which said forged and counterfeited promissory note is as follows, that is to say: (*here set out the document in the manner prescribed in note*),(e) with intent to defraud the said A. B.,(f) (to the great damage of the said A. B.), (g) against, etc. (*Conclude as in book 1, chapter 3.*)

(a) This form is introduced, not because it can be of use as a precedent, the common law remedy having been absorbed by statutes, but in order to place in a more regular shape the necessary notes. For the groundwork of the latter, I have depended on Mr. Starkie (C. P. 106), adding at large the American and the later English authorities.

(b) "It is sufficient to allege that the defendant forged and counterfeited, though it is usual to aver that he did *falsely* forge and counterfeit, for the adverb is sufficiently implied in the former words. 1 Str. 12, 19; East, P. C. 985; R. v. Mariot, 2 Lev. 221; R. v. Dawson, 1 Str. 19. In Ellsworth's case (*coram* Willes, York Lent Assizes, 1780, East, P. C. 986), the indictment stated that the said T. E., the said bill of exchange did feloniously *alter* and cause to be altered, by falsely making, forging, and adding the letter *y* to the word eight in the bill mentioned, whereby, etc. The second count alleged, that certain persons un-

known altered the bill, and charged the defendant with uttering and publishing the bill as true, knowing it to be forged. The words of the statute on which the indictment was founded (2 Geo. II. c. 25, s. 1) are, "If any person shall *falsely make, forge, or counterfeit.*" It was objected, in arrest of judgment, that the indictment merely charged that certain persons unknown did alter, by *falsely making*, etc., and did not charge, in the words of the act, that they *falsely made, forged*, etc., and that the word *alter* was not used in the statute. But the judges held that the indictment was good, and that there was no difference in substance or in the nature of the charge, whether the indictment were for feloniously altering, by falsely making and forging, or for feloniously making and forging, by falsely altering. In the case of *King v. Bigg* (3 P. Wms. 419), the indictment alleged that the defendant feloniously *erased* an indorsement from a bank note; the jury found that the defendant had expunged the inscription, by means of some unknown liquor, and the judges held that the prisoner was guilty. The majority were of this opinion, but the case involved many other points, and the prisoner was afterwards pardoned on condition of transporting himself. Str. 19." Stark. C. P. 108.

"In consideration of law, every *alteration* of an instrument amounts to a forgery of the whole. In Dawson's case, it was holden by ten judges, that the *alteration* of the figure 2 in a bank note to 5, was a forging of a bank note. East, P. C. 978." Stark. C. P. 108. See Wh. Cr. L. 8th ed. § 735, and authorities to be hereafter cited.

The indictment in Teague's case (East, P. C. 979), for making, forging, and counterfeiting a bill of exchange under the stat. 7 George II. c. 22, was holden to be supported by proof, that the defendant had altered a bill of exchange for the payment of £10 into £50, both in words and figures. It was objected, that the defendant ought to have been charged with altering the genuine bill, since the stat. 7 Geo. II. c. 22, makes it a distinct offence to *alter*; but the judges, on the authority of Dawson's case, held that the conviction was proper, and that every alteration of a true instrument, for such a purpose, made it, when altered, a forgery for the whole instrument. See also *State v. Hitchens*, 2 Harringt. 527; *Com. v. Ladd*, 15 Mass. 526; *State v. Waters*, 3 Brev. 507; *Com. v. Hayward*, 10 Mass. 34.

But in cases where a genuine note or instrument has been altered, it is usual to allege the *alteration* in one count of the indictment. See East, P. C. 980; *R. v. Harrison*; *R. v. Elsworth*, there referred to.

It is not sufficient to aver, that the defendant forged or caused to be forged, for it is not certain and positive. 1 Salk. 342; 5 Mod. 137; Holt, R. 345. An indictment which charges a prisoner with the offences of falsely making, forging, and counterfeiting, of causing and procuring to be falsely made, forged, and counterfeited, and of willingly acting and assisting in the said false making, forging, and counterfeiting, is a good indictment, though all of these charges are contained in a single count; and as the words of the statute have been pursued, there being a general verdict of guilty, judgment ought not to be arrested on the ground that the offences are distinct. *Rasnick v. Com.*, 2 Va. Cases, 356; *State v. Houseall*, 1 Rice's Dig. 346. Wh. Cr. L. 8th ed. § 727 for cases. But where two distinct offences, requiring different punishments, are alleged in the same count, as where the forging of a mortgage, and of a receipt indorsed thereon, are both charged in the same count, being repugnant offences, and the defendant is convicted, the judgment will be arrested. *People v. Wright*, 9 Wend. 193.

(c) The allegation in brackets, though rarely necessary, is not duplicity when introduced. See last paragraph, and see Wh. Cr. L. 8th ed. § 727. It is not necessary to go on to allege by what means the "causing and procuring" was brought about. *Brown v. Com.*, 2 Leigh, 769.

(d) It is essential that the purport of the instrument should be properly described, so as to bring it within the statute. The authorities on this point are collected in the next note.

(e) Where the words of a document are essential ingredients of the offence, as in forgery, passing counterfeit money, selling lottery tickets, sending threatening

letters, libel, etc., the document must at common law be set out in words and figures. *R. v. Mason*, 2 East, 238; 2 East, P. C. 976; *R. v. Powell*, 1 Leach, 77; *R. v. Hart*, 1 Leach, 145; *Com. v. Stow*, 1 Mass. 54; *Com. v. Bailey*, 1 Mass. 62; *Com. v. Wright*, 1 Cush. 46; *Com. v. Tarbox*, *Ib.* 66; *State v. Farland*, 3 Halst. 333; *State v. Gustin*, 2 South. R. 749; *Com. v. Gillespie*, 7 S. & R. 469; *Com. v. Sweeney*, 10 S. & R. 173; *State v. Stephens*, *Wright's Ohio R.* 73; *State v. Twitty*, 2 Hawks, 248; *Rooker v. State*, 65 Ind. 86. As to variance see *Wh. Cr. Ev.* § 114. As to forgery, see *Wh. Cr. L.* 8th ed. § 727. As to libel, *Ibid.* §§ 1156 *et seq.* Thus, the omission of a word in an indictment for forgery is fatal. *U. S. v. Hinman*, 1 Baldwin, 292; *U. S. v. Britton*, 2 Mason, 464; *State v. Street*, *Tayl.* 158; and see *State v. Bradley*, 1 Hay. 403; *State v. Coffey*, N. C. Term R. 272. In such cases, however, it is not necessary to insert the vignettes, devices, letters, or figures in the margin, as they make no part of the meaning. *State v. Carr*, 5 N. H. 367; *Com. v. Bailey*, 1 Mass. 62; *Com. v. Stephens*, *Ibid.* 203; *Com. v. Taylor*, 5 Cush. 605; *People v. Franklin*, 3 Johnson's C. 299; *Com. v. Searle*, 2 Binn. 332; *Buckland v. Com.*, 8 Leigh, 732; *Griffin v. State*, 14 Ohio St. R. 55. The same rule holds to stamps. *Wh. Cr. L.* 8th ed. § 677. But it has been held fatal to omit the name of the state in the upper margin of a copy of a bank note, when such name is not repeated in the body. *Com. v. Wilson*, 2 Gray, 70.

When it is necessary to set forth exactly a document, it may be preceded by the words, "to the tenor following," or "in these words," or "as follows," or "in the words and figures following," for though the term "tenor," which imports an accurate copy (2 Leach, 660, 661; 3 Salk. 225; *Holt*, 347-350, 425; 11 Mod. 96, 97; *Douglass*, 193, 194; *Wh. Cr. L.* 8th ed. § 737), has been considered to be the most technical way of introducing the document, yet it has been ruled that "as follows" is equivalent to the words "according to the tenor following," or "in the words and figures following," and that if under such an allegation the prosecutor fails in proving the instrument verbatim, as laid, the variance will be fatal. 1 Leach, 78; 2 Leach, 660, 961; 2 East P. C. 976; 2 Bla. Rep. 787; *Clay v. People*, 86 Ill. 147; *Wh. Cr. L.* 8th ed. § 737. Where the indictment, by these or similar averments, fails to claim to set out a copy of the instrument in words and figures, it will be invalid. 2 Leach, 597, 660, 661; *State v. Bonney*, 34 Me. 383; *Com. v. Wright*, 1 Cush. 46; *Dana v. State*, 2 Oh. St. 91; *Wh. Cr. L.* 8th ed. §§ 737 *et seq.*, 1656.

Purport, it is said, means the effect of an instrument as it appears on the face of it in ordinary construction, and is insufficient when literal exactness is required; tenor means an exact copy of it. 2 Leach, 661; *State v. Bonney*, 34 Me. 383; *State v. Witham*, 47 Me. 165; *Com. v. Wright*, 1 Cush. 46. And if the instrument does not "purport" to be what the indictment avers—*i. e.*, if its meaning is not accurately stated—the variance is fatal. *Dougl.* 300; *State v. Molier*, 1 Devereux, 263; *State v. Carter*, Conf. N. C. R. 210; *State v. Wimberly*, 3 McCord, 190; *Wh. Cr. Ev.* § 114.

The words "in manner and form following, that is say," do not profess to give more than the substance, and are usual in an indictment for perjury (1 Leach, 192; *Dougl.* 193, 194); but the word "aforesaid" binds the party to an exact recital. *Ibid.*; *Doug.* 97. "According to the purport and effect, and in substance," are bad, in cases where exactness of setting forth is required. *Com. v. Wright*, 1 Cush. 46; *State v. Brownlow*, 7 Humph. 63; *Dana v. State*, 2 Oh. St. 91. And so is "substance and effect." *Com. v. Sweeney*, 10 S. & R. 173.

Quotation marks by themselves are not sufficient to indicate tenor, unless there be something to show that the document within the quotation marks is that on which the indictment rests. *Com. v. Wright*, 1 Cush. 46.

The attaching of one of the original printed papers to the indictment, in place of inserting a copy, is not sufficient indication that the paper is set out in the very words. *Com. v. Tarbox*, 1 Cush. 66; *Wh. Cr. L.* 8th ed. §§ 736 *et seq.*

A mere variance of a letter will not be fatal, even when it is averred that the

tenor is set out, provided the meaning be not altered by changing the word misspelt into another of a different meaning. Wh. Cr. Pl. & Pr. § 273; Wh. Cr. Ev. § 114; R. v. Drake, Salk. 660; R. v. Wilson, 2 C. & R. 527; 1 Den. C. C. 281; 2 Cox C. C. 426; U. S. v. Hinman, 1 Bald. 292; U. S. v. Burroughs, 3 McL. 405; State v. Bean, 19 Vt. 530; State v. Weaver, 13 Ired. 491; State v. Coffee, 2 Murphey, 320. For illustrations see Wh. Cr. Pl. & Pr. § 173.

Where the document on which the indictment rests is in the defendant's possession, or is lost or destroyed, it is sufficient to aver such special facts as an excuse for the non-setting out of the document, and then to proceed, either by stating its substance, or by describing it as a document which "the said inquest cannot set forth by reason," etc., of its loss, destruction, or detention, as the case may be (Wh. Cr. Ev. §§ 118, 199. See Com. v. Sawtelle, 11 Cush 142; People v. Bogart, 36 Cal. 245); giving, however, the purport of the instrument as near as may be. Wh. Cr. L. 8th ed. §§ 728 *et seq.*; R. v. Watson, 2 T. R. 200; R. v. Haworth, 4 C. & P. 254; R. v. Hunter, 4 C. & P. 128; U. S. v. Britton, 2 Mason, 468; State v. Bonney, 34 Me. 223; State v. Parker, 1 Chipman, Vt. 294; People v. Badgeley, 16 Wend. 531; Wallace v. People, 27 Ill. 45; Hart v. State, 55 Ind. 599; Pendleton v. Com. 4 Leigh, 694; State v. Davis, 69 N. C. 313; Du Bois v. State, 50 Ala. 139. See fully Wh. Cr. Ev. §§ 118, 199. For illustrations see Wh. Cr. Pl. & Pr. § 176. The same rule, as we will hereafter see, is applied to indecent publications.

Even where the prosecutor's negligence caused the loss, the loss will be an excuse for non-description, unless the misconduct was so gross as to imply fraud. State v. Taunt, 16 Minn. 109.

When there is an allegation that a document is *destroyed*, as an excuse for its non-description, there is a fatal variance between the indictment and the proof if the destroyed instrument is produced on trial. Smith v. State, 33 Ind. 159.

Wherever the whole document is essential to the description of the offence, the whole must be set out in the indictment. It is otherwise, however, as to indorsements and other extraneous matter having nothing to do with the part of the document alleged to be forged. Wh. Cr. L. 8th ed. § 753. And see Com. v. Ward, 2 Mass. 397; Com. v. Adams, 7 Met. 50; Perkins v. Com., 7 Grat. 651; Buckland v. Com., 8 Leigh, 732; State v. Gardiner, 1 Ired. 27; Hess v. State, 5 Ohio, 5; see R. v. Testick, 1 East, 181, n.; Wh. Cr. L. 8th ed. §§ 729 *et seq.*

Where the indictment is for forging a note or bill, the indorsement, though forged, need not be set out. Com. v. Ward, 2 Mass. 397; Com. v. Adams, 7 Met. 50; Com. v. Perkins, 7 Grat. 654; Simmons v. State, 7 Ham. 116; Wh. Cr. L. 8th ed. §§ 731-3, and Wh. Cr. Pl. & Pr. § 176. And, as we have seen, it is not necessary to set forth vignettes or other embellishments, though if this be attempted a variance may be fatal. Wh. Cr. Ev. § 114; Wh. Cr. L. 8th ed. § 731.

Alterations.—An altered document, as is elsewhere seen, may be averred to be wholly forged. Wh. Cr. L. 8th ed. § 735. But if an alteration be averred, the alteration must be specified (*Ibid.*), and an addition which is collateral to the document must, if forged, be specially pleaded. Com. v. Woods, 10 Gray, 480.

Translations.—A document in a foreign language must be translated and explained by averments. R. v. Goldstein, R. & R. 473; 7 Moore, 1; 10 Price, 88; Wh. Cr. L. 8th ed. § 729. The proper course is to set out, as "of the tenor following," the original, and then to aver the translation in English to be "as follows." *Ibid.*; R. v. Szudurskie, 1 Moody, 429; R. v. Warshaner, 1 Mood. C. C. 466; Wormouth v. Cramer, 3 Wend. 394. As to California, see special statute. People v. Ah Woo, 28 Cal. 205. If the translation be incorrect the variance is fatal. R. v. Goldstein, *ut supra*; and see 20 Wis. 239. And so where initials appear without an averment of what they mean; R. v. Barton, 1 Moody C. C. 141; R. v. Inder, 2 C. & K. 635; and where there is no averment of who the officer was whose name is copied in a forged instrument, there being no averment of what the instrument purports to be. R. v. Wilcox, R. & R. C. C. 50.

(*Whether it be necessary to set out the whole of the forged writing.*) "In the short report of Smith's case, in the first volume of Salkeld (Salk. 342, Pasch. 2 Ann), it is stated, that the defendant was indicted for forging a deed of assignment of a lease, signed with the mark of one Goddard, *cujus tenor sequitur*, but set not down the mark as in the assignment; it was objected that without the mark it could be no forgery, and the objection was overruled. But this is a very loose report of the case, which appears to be the same with that reported in the third volume of Salkeld, and by Ld. Raymond, under the title of the Queen v. Goddard, in 3 Salk. 171, Trin. 2 Ann; R. v. Goddard *et al.*, Ld. Raym. 920, R. v. Goddard and Carlton; according to which the defendant was indicted for forging an assignment of a lease, and the tenor was set out; at the bottom of the assignment was the mark of the assignor, but no mark appeared upon the *postea*; and the whole court held, that since, by the statute of frauds, an assignment must be signed, the want of the mark of the defendant upon the *postea* was a fatal defect; but as another indictment had been found against the defendant, the court gave no judgment, but ruled that the defendant should plead to the signing. But Ld. Holt held, that if the indictment had been for forging a deed of assignment (Mr. East, in his Pleas of the Crown, 776, cites Salk. 342, and questions this point), and the deed had been set forth without any mark or signature, that might have been good, because signing is not necessary to a deed; for in former times they were sealed only, and not signed. Salk. 342, Pasch. 2 Ann."

Where the instrument forged was a bond, purporting to be attested by one A. B., and the indictment charged that the defendant "wittingly and willingly did forge and cause to be forged a certain paper writing, purporting to be a bond, and to be signed by one C. D., with the name of him the said C. D., and to be sealed with the seal of the said C. D.;" and the tenor of the bond, with a subscribing witness was set forth, but did not charge that the bond purported to be attested by one A. B., a motion to arrest the judgment on this account was overruled, on the ground that nothing need be averred in the indictment which is not necessary to constitute the offence charged. It is not necessary, it is said, that there should be a subscribing witness to a bond, and if there be one, it is not his signature, but the signing, sealing, and delivery by the obligor, that constitute the instrument a deed. *State v. Ballard*, 2 Murph. 186.

It seems, in all cases, to be sufficient to set out that part of a written document which comprehends the particular instrument forged, though connected with other matter. Thus, in an indictment for publishing a forged receipt for money, the receipt alone was set forth, as follows: "18th March, 1733, received the contents above, by me, Stephen Withers;" and, upon its appearing in evidence that the above was forged at the bottom of a certain account, it was objected that the account itself should have been set forth, for otherwise, it would not appear that it was a receipt for money. But all the judges held the indictment to be sufficient; for it was laid to be a forged receipt for money, under the hand of S. W., for £1 4s., and the bill itself was only evidence to make out that charge. *R. v. Testick*, 1 East, 181; East, P. C. 925.

How the forged instrument should be shown to be of the kind prohibited.

It must be shown on the face of the indictment, by proper averments, that the instrument forged is of the particular kind prohibited, in respect to which an indictment lies. Under a subsequent head (*infra*, form 415) will be given a summary of the principal terms used in this connection, viz., "receipt," "acquittance," "bill of exchange," "promissory note," "bank note," "warrant, order, and request," "deed," "obligation." Where a full setting forth of a document is given, its technical title need not be averred. Wh. Cr. Pl. & Pr. § 184; Wh. Cr. L. 8th ed. § 728. But where only the forgery of documents of a particular class is indictable by statute, then the document must be averred to be of such class. Wh. Cr. L. 8th ed. § 728 and cases there cited. The indictment must show the document to be capable of being used in legal procedure. Wh. Cr. L. 8th ed.

§ 739. In other words, it must be such that it could have been used as an instrument of fraud.

"A forged instrument cannot in strictness be called by the name of the real instrument which it assumes to be; an instrument purporting to be a bond, or writing obligatory, is not such, for no one is bound by it; and a forged writing, purporting to be a will, ought not in strictness to be called *a will*, for it is not so in any sense, and can have no legal operation whatever." Stark. C. P. 113.

"But many statutes describing the offence of forgery use the words, 'and if any person shall forge any *will*, or *bond* (22 Geo. II. c. 25), or *writing obligatory, etc.*;' and therefore it may be averred in the indictment, that the defendant forged the will (R. v. Birch and Martin, Leach, 92; East, P. C. 980), bond, or writing obligatory. Dunnett's case, East, P. C. 985. But it is in all cases proper, and seemingly more correct, to aver, that the defendant forged and counterfeited a certain paper writing *purporting* to be the last will (*or other instrument whose forgery is penal*). In the case of the King v. Birch and Martin, it was so averred, and the judges held, that although the statute uses the words 'shall forge a will,' it was sufficient to lay it either way. R. v. Birch and Martin, Leach, 92; East P. C. 980; 2 Bl. R. 790. And, therefore, in general, if it can be collected from the forged writing itself that it assumes to be a bond, etc., it may be averred in the indictment, either that the defendant forged a certain bond, or that he forged a certain writing purporting to be a bond. Thus, in Taylor's case (R. v. Taylor, Leach, 255; East, P. C. 977), the defendant was charged with forging a receipt for the sum of £20, as followeth: 'Re'd R. Wilson.' And in Testick's case (1 East, 181), the tenor set out was: 'Received the contents above, by me, William Withers;' and this was holden to be properly described as a receipt. In fact, in such case the very terms of the instrument showed it to be a receipt.

"The *purport* of a writing is that which appears on the face of that writing (R. v. Gilchrist, Leach, 753); if, therefore, the forged writing assumes in terms to be a will, bond, or receipt, it may be described as *purporting* to be a will, bond, or receipt. But in alleging the *purport* of a forged writing, great caution is necessary; for unless it can be collected plainly from the terms of the writing set forth that it is in form and assumes to be that particular instrument which, according to the allegation, it purports to be, the indictment will be vicious. R. v. Hunter, R. & R. 510; R. v. Birkett, Ib. 251. Thus, in William Jones's case (Leach, 243; East, P. C. 883; Doug. 302), the indictment alleged, 'purporting to be a bank note;' the writing set forth was as follows: 'No. F. 946. I promise to pay John Wilson, Esquire, or bearer, ten pounds, London, March 4th, 1776, for self and company of *my* bank in England, entered, S. Jones.' And the court were of opinion that the paper writing did not *purport* to be a bank note, and, therefore, that the indictment was repugnant. So an indictment for forging a bill of exchange, as purporting to be directed to John King, by the name and addition of John King, Esq., was for the same reason holden to be vicious. R. v. Jeremiah Reading, Leach, 672. The same was holden of an indictment which described the subscription C. Oliver as purporting to be the name of Christopher Oliver. R. v. Reeves, Leach, 933. The objection was at first overruled by Heath and Lawrence, JJ., and Thomson, B., who thought that there was a shade of difference between this case and that of Gilchrist; and it does not appear what the ultimate opinion was. In Lovell's case (East, P. C. 990; Leach, 282), the indictment ran thus: 'purporting to be directed to Messrs. Drummond and Co., Charing Cross,' by the name of Mr. Drummond; and the indictment was held to be good, but it does not appear that the objection was taken." An indictment for uttering as true a forged promissory note, purporting to be made by A., payable to B., or order, is proved by evidence of the uttering of such note with the indorsement of B.'s name on the back thereof. Com. v. Adams, 7 Met. 50.

"In Gilchrist's case (Leach, 753; East, P. C. 982), the indictment charged the defendant with forging a paper writing, etc., purporting to have been signed

by Thomas Exon, clerk, and to be directed to *George Lord Kinnaid*, William Morland, and Thomas Hammersley, of, etc., bankers and partners, by the name and description of Messrs. Rawson, Morland, and Hammersley; the tenor of the bill was then set out as follows: '*Messrs. Rawson, Morland, and Hammersley*, please to pay, etc. (signed) T. Exon;' and the indictment was, by the ten judges present at the conference, holden to be repugnant and defective, for it could not *purport* to be directed to Lord Kinnaid, since his name did not appear upon the bill.

"And with respect to the word *purport*, it is to be observed generally, that its use is to show that the forged writing falls within the prohibited description: and therefore no other description should be given under the word *purport*, except of the particular nature of the forged writing, as that it purports to be a bond, a bill of exchange, a bank note, or the like. Any further description is highly objectionable, since it is unnecessary, and exposes the record to great danger from variance. See Mr. Justice Buller's observations, *R. v. Gilchrist*, Leach, 753.

"And the same objection applies to giving any other description of the written instrument (whose tenor is afterwards set forth), beyond that of its general nature.

"The defendant was indicted for forging and uttering a bill of exchange, requiring, etc., and signed by *Henry Hutchinson*, for, etc. Upon the trial, the prosecutor proved that the signature *Henry Hutchinson* was forged; it was then objected that the indictment, averring it to have been signed by him, was disproved; and so the judges held, upon reference to them after conviction. East, P. C. 985. And an indictment will be defective, if it allege, after describing the forged writing, 'by which A. is bound to B.,' for, since it is forgery, A. could not be bound by it. Bac. Abr. tit. Ind. 556." Stark. C. P. 117.

Where a bill of parcels is of this tenor, viz.: "Mr. J. L. bought of E. and O.—the above charged to G. C.," the purchaser, J. L., added these words, "by order of C. C.," it was held, that the addition amounted to an acquittance or discharge, and was a forgery within the Massachusetts statute. Com. v. Ladd, 15 Mass. 526. For other points see notes to form 415.

"An indictment charged the defendant with forging a *bond and writing obligatory*. The statute upon which it was founded mentions bond and also writing obligatory. The instrument set forth purported to be a bond, but the judge held that it was properly described. *R. v. Dunnett*, East, P. C. 985. For a bond is a writing obligatory, and at all events, *semble*, the subsequent description would be but surplusage." Stark. C. P. 117.

An indictment charging the forging of "a certain bond," instead of a certain paper writing purporting to be a bond, is good. *State v. Gardiner*, 1 Ire. 27. See note to form 415.

So of an indictment which mentions the instrument forged as an instrument of writing purporting to be an order drawn by A. on B. for nine dollars. *McGuire v. State*, 37 Ala. 161.

"In *Bigg's* case, the prisoner was charged with erasing an indorsement on a bank note; it turned out in evidence that the inscription charged to have been erased had been written, according to the custom of the bank, upon the *inside and face* of the bill. The jury found specially, that an inscription so written was commonly called an *indorsement*, and a majority of the judges held, that the description was correct." Stark. C. P. 117.

An order on the cashier of the Bank of the United States is evidence in support of an indictment for forging an order on the cashier of the corporation of the Bank of the United States. *U. S. v. Hinman*, 1 Bald. 292.

Instruments of other specific denominations may, it seems, be described as warrants or orders, if they be in effect such. *Lockett's case*, East, P. C. 940; Leach, 110; *R. v. Sheppard*, Leach, 265; see *infra*, 415, note. And a bill of exchange, it has been held, may be laid as an order for the payment of money. *Willoughby's case*, East, P. C. 944. "Where the forged instrument is actually within the meaning of the statute on which you intend framing your indictment

ment," says Mr. Archbold, C. P. 357, "but does not sufficiently appear to be so on the face of it, you must, if the instrument be set out, not only set out a literal copy of it in the indictment, but must also add such averments of extrinsic facts as may be necessary to make it appear upon the face of the record that the forged instrument is one of those intended by and described in the statute. Thus, for instance, where, by the usage of a public office, the bare signature of a party upon a navy bill operated as a receipt, an indictment for forging such a receipt, setting forth the navy bill and indorsement, and charging the defendant with having forged 'a certain receipt of money,' to wit, the sum of twenty-five pounds, mentioned and contained in the said paper called a navy bill, which forged receipt was as follows: that is to say—'William Thornton, William Hunter,'" was holden bad, because it did not show, by proper averments, that these signatures imported a receipt. *R. v. Hunter*, 2 Leach, 624; 2 East, P. C. 928. So, where an indictment charged the defendant with forging a receipt in the handwriting of Henry Hargreaves, as thus: "Received, H. H.," it was holden that the indictment was bad, because there was nothing to show what H. H. meant. *R. v. Barton*, 1 Mood, C. C. 141. See *R. v. Testick*, 1 East, 181, n.; *ante*, p. 274 (see Archbold's C. P. p. 46). So the words, "settled, Sam. Hughes," written at the foot of a bill of parcels, were held of themselves to import a receipt of acquittance, and that no averment was necessary that the word "settled" meant a receipt or acquittance. *R. v. Martin*, 1 Mood. C. C. 483; 7 C. & P. 549; overruling *R. v. Thompson*, 2 Leach, 810. And see *R. v. Houseman*, 8 C. & P. 180; *R. v. Vaughan*, *ib.* 276; *Reg. v. Bordman*, 2 M. & Rob. 147; see *infra*, 415, note.

An indictment, which charged the false making to have been in the alteration of an order, given by the defendant, without charging that the alteration was made after it was circulated and had been taken up by him, was held to be erroneous. *State v. Greenlee*, 1 Dev. 523. For the same reason, an indictment for forging a deed must aver that it was sealed. 3 Keb. 388; 3 Inst. 169; *Smith's case*, 3 Salk. 171; though see *Penna. v. Misner*, Add. R. 44.

"An indictment for forging an order for the delivery of goods must show that the person whose name is subscribed had authority to make such an order. East, P. C. 958; 2 Leach, 3d ed. 611. But it is sufficient, if the order purport that the party sending it had such authority, although, in fact, he had not. Fost. 119; East, P. C. 940. And it must, for the same reason, appear that the person to whom the order is directed, had possession of the goods." Stark. C. P. 119.

An indictment for forging an acquittance need not allege that it was presented, or delivered to any person as a genuine acquittance for goods delivered, and in consideration thereof. *Com. v. Ladd*, 15 Mass. 526.

"If the instrument, as stated with proper averments upon the record, be such as if genuine would be illegal, the indictment will be vicious and ineffectual; and therefore, in the case of the *King v. Moffat*, Leach, 483, for forging a bill of exchange for the payment of three guineas, without specifying the payee's place of abode, the judges were of opinion, that the forgery did not amount to a capital offence; since, by the stats. 15 Geo. III. c. 51, and 17 Geo. III. c. 30, made perpetual by 27 Geo. III. c. 16, the bill of exchange, if read, would not have been valid. Wall's case, East, P. C. 953.

"And in *Smith's case* (3 Salk. 371), above alluded to, the court were of opinion, that an indictment for forging an assignment would be vicious, unless it showed that the assignment was signed. *The distinction seems to be this*: where the instrument appears to be valid, an indictment may be maintained, although, from some collateral defect, that instrument, if genuine, could never legally have been put in use; otherwise, where the defect is apparent on the face of the instrument. Per Eyre, J., *R. v. Jones and Palmer*, East, P. C. 991; Leach, 405. Hence an indictment has been holden to be maintainable for forging a conveyance, though the estate was described by the wrong name (*Japhet Cooke's case*, Str. 901; Fitzg. 57; *Masterman's notes*); for forging a protee-

tion in the name of one as member of Parliament who was not so (*R. v. Deakins*, 1 Sid. 142); for forging and publishing a writing as the last will of a person still living (*R. v. Murphy*, 10 St. Tr. 183; *R. v. Sterling*, Leach, 117; *Cogan's case*, 2 Leach, 503); for forging an order for the payment of a seaman's prize money, though in fact the seaman was, at the time the note bore date, in a situation which rendered the order invalid under the stat. (*R. v. M'Intosh*, East, P. C. 956; 32 Geo. III. c. 34, s. 2)." Starkie, *ut supra*.

When a document is incomplete on its face, and does not apparently fall under the head of documents which are subjects of forgery, the indictment must supply the necessary explanation. See cases in Wh. Cr. L. 8th ed. § 740.

(f) The manner of averring intent generally has been already examined in notes to form 2. In forging it is sufficient to allege a general intention to defraud a particular person, *which intention must be proved as laid*. Powell's case, Leach, 90; *R. v. Ellsworth*, 2 East, P. C. 986; and see East, P. C. 988; *R. v. Powell*, 12 Cox, C. C. 230; *People v. Rathbun*, 21 Wend. 509; *State v. Odel*, 2 Tr. Con. Rep. S. C. 758; *Rosc. Cr. Ev.* 400; 3 Brevard, 552; *State v. Greenlee*, 1 Dev. 523; Wh. Cr. L. §§ 297, 1492. It is not necessary, at common law, however, to allege the intention to defraud, when it may be gathered from other averments; unless in cases where the statute upon which such indictment is founded requires the use of the terms. *State v. Calvin*, etc., Charl. 151.

"But it is not essential, either in indictments for obtaining money under false pretences, or in case of forgery, after setting out the false pretences or forged writing, to aver the particular means by which the false pretences were made available in the one case, or how the forged writing was to be made the instrument of fraud in the other. Thus an indictment for causing and procuring a counterfeit bank note to be offered to be passed, without stating by whom or how the accused caused and procured it to be done, is sufficiently certain and good." Stark. C. P. 122; see also *Brown v. Com.*, 2 Leigh, 769.

"So, in the case of *R. v. Young*, 3 T. R. 176, above referred to, after stating the false pretence, namely, a wager, which was pretended to have been betted upon a foot-race, the indictment averred that the defendant, under color and pretence of having made the bet, obtained from the prosecutor the sum of twenty guineas, as a part of such pretended debt, with intent to defraud and cheat him thereof, without stating by what particular inducement he obtained the money. And in the case of forgery, it is sufficient to aver generally, that the defendant intended to defraud a particular person, without showing upon the record how he intended to do so. Powell's case, Leach, 90; East, P. C. 989; Ellsworth's case, 2 East, P. C. 986; Crook's case, East, P. C. 992; Stark. C. P. 122."

Where the offence was forgery of a deposition, with intent to procure a divorce, it is not necessary to aver an intent to defraud. *State v. Kimball*, 50 Maine, 409.

When the statute includes only banks duly incorporated, then the indictment must aver the incorporation of the bank alleged to have been defrauded. It is otherwise when the statute, in cases of home banks, does not make the case of the prosecution dependent upon incorporation. The pleader, in any case, may charge the intent to have been to defraud the party on whom the note was passed; and if so the incorporation of the bank need not be averred. See for authorities Wh. C. L. 8th ed. § 741. Though a party defrauded must be specified, it is not necessary that the specification should include all the parties defrauded. It is enough if any one of them be averred. See cases cited in Wh. Cr. L. 8th ed. § 743.

All the partners in a firm need not be set out in averring the intent to defraud. Thus, where the first count charged the offence to have been committed with intent to defraud D. L. and D. L. Jr., and the second count stated the offence to have been committed with intent to defraud the president and directors of said company, the fourth count, etc., with an intent to defraud D. L.; the court, on motion in arrest of judgment, held, that the omission of one of the partners in one count, and of two of them in another, was not fatal; for an acquittal on such

(265) *First count. Forging at common law a certificate of an officer of the American army, in 1777, to the effect that he had received certain stores, etc.*(h)

That C. S., late of the county aforesaid, yeoman, on, etc., and long before and since, was a clerk to the department of the commissary-general of military stores in the armies of the United States of America, and intrusted and employed by Colonel B. F., the commissary-general of military stores in the armies aforesaid, and by the honorable Continental Congress, to make payments and take receipts, bills of parcels, and other vouchers for military stores, and for divers articles necessary and fitting in the preparation of military stores purchased for the use of the armies aforesaid, and to keep the accounts thereof. And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said C. S., on, etc., at the city of Philadelphia, in the county aforesaid, contriving and intending falsely and fraudulently to deceive and defraud the United States aforesaid, with force and arms, falsely, wickedly, and unlawfully did make, forge, and counterfeit, and cause to be made, forged, and counterfeited, a certain writing purporting to be a receipt for one thousand and twenty pounds and fifteen shillings, and purporting to be signed in the name of one A. F., in the words and figures following, to wit, “3. Received 1st July, 1777, of Col. B. F., C. G. U. S., one thousand and twenty pounds, fifteen shillings, for 820 bayonet belts, and 920 cartouch boxes for the use of the army.

“—£1020 15—

A. F.”

to the evil example of all others in like case offending, to the

an indictment will always be a bar to another prosecution for the same forgery, though laid with intent to injure some other person. *People v. Curling*, 1 Johns. R. 320; see *R. v. Hanson*, 1 C. & M. 334. *Infra*, 295(d).

(g) This averment is unnecessary in statutory forgeries, and does not seem to be required at common law (*People v. Rynders*, 12 Wend. 425). In fact, indictability does not depend upon damage having been done. That the document was one capable of doing damage is enough. *R. v. Goate*, 1 Ld. Ray. 737; *R. v. Holden*, R. & R. 154; *Com. v. Ladd*, 15 Mass. 526; *People v. Stearn*, 21 Wend. 534; *West v. State*, 2 Zab. 292; *Hess v. State*, 5 Oh. St. 5.

(h) *Res. v. Sweers*, 1 Dall. 41. The objection taken to this and the succeeding indictment, that the intent to defraud the United States was vicious, was overruled by McKean, C. J., and the defendant sentenced. The trial, it should be observed, was in the supreme court of Pennsylvania.

great damage of the United States, and against, etc. (*Conclude as in book 1, chapter 3.*)

(266) *Second count. Publishing the same.*

And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said C. S., contriving and intending the said United States falsely and fraudulently to deceive and defraud, then and there, with force and arms, the said writing so as aforesaid falsely made and counterfeited, purporting to be a receipt for the sum of one thousand and twenty pounds and fifteen shillings, and purporting to be signed in the name of the said A. F., wickedly, unlawfully, and fraudulently did publish and cause to be published as and for a true writing and receipt of the said A. F.; which said falsely forged and counterfeited writing is in the words and figures following, to wit, "3. Received 1st July, 1777, of Colonel B. F., C. G. U. S. one thousand and twenty pounds fifteen shillings, for 820 bayonet belts, and 920 cartouch boxes for the use of the army.

"—£1020 15—

A. F."

(he the said C. S., at the time of publishing the said false and counterfeit writing, there by him in form aforesaid, well knowing the said writing to have been falsely forged and counterfeited as aforesaid), to the evil example of all others in like case offending, to the great damage of the said United States, and against, etc. (*Conclude as in book 1, chapter 3.*)

(267) *Forgery. Altering a certificate of an officer of the American army in 1778, to the effect that he had received for the use of the troops at Carlisle certain articles of clothing. Offence laid at common law, the intent being to defraud the United States.*(i)

That C. S., late of the county aforesaid, yeoman, on, etc., was a deputy commissary-general of military stores in the armies of the United States of America, and entrusted and employed by Colonel B. F., the commissary-general of military stores in the armies aforesaid, and by the honorable Continental Congress, to make purchases of military stores and of divers other articles

(i) R. v. Sweers, 1 Dall. 41.

necessary and fitting in the preparation of military stores, for the use of the armies aforesaid, and to make payments and take receipts, bills of parcels, and other vouchers therefor. And the jurors aforesaid, upon their oaths and affirmations aforesaid, do say, and further present, that the said C. S., on, etc., at the city of Philadelphia, in the county aforesaid, having in his custody and possession a certain bill of parcels or account, with a certificate and receipt all in writing, for a parcel or quantity of flannel cloth by him purchased of one M. D., for the use of the laboratory of the same armies, and which said writing was in the words, figures, ciphers, and letters following, that is to say :—

“ U. S. A.

To M. D., Dr.

“ 1778, Feb. 4th.	To 57 & a qr. yds. flannel,	32s. 6d.	£83	5	7
	To 9 yds.	do. 35s.	15	15	9
	To 107 & 3 qr. yds.	do. 52s. 6d.	282	16	10
			<hr/>		
			£381 17 5”		

“ I do certify that the above was purchased and delivered to me for the use of the laboratory at Carlisle.

I. C., *Cap. of the Artillery.*”

And on the back side of which said writing is indorsed and written the words following : “ Received the within contents in full, M. D. ;” he the said C. S., afterwards, to wit, on the same day and year aforesaid, at Philadelphia aforesaid, in the county aforesaid, with force and arms, the said bill of parcels or writing falsely, fraudulently, and deceitfully did alter and cause to be altered, by falsely making, forging, and adding the figure 4 to and before the figure 9, in the second item of the said bill of parcels or writing, which figures and letters did, before such last mentioned forgery, import and signify nine yards, but by reason and means of such last mentioned forgery and addition did become, import, and signify forty-nine yards ; and also by forging and altering the figure 1, in the sum of the said second item in the bill of parcels or writing aforesaid, to the figure 8 ; which figures did, before such last mentioned alteration and forgery, import and signify fifteen pounds and fifteen shillings, but by reason and means of such last mentioned forgery and alteration did become, import, and signify eighty-five pounds and fifteen

shillings; and also by falsely forging and altering the figure 3 to the figure 4, and the figure 8 to the figure 5, in the sum total or amount of the said bill of parcels or writing; which figures did, before such last mentioned forgery and alteration, import and signify three hundred and eighty-one pounds, seventeen shillings, and five pence, but by reason and means of such last mentioned forgery and alteration did become, import, and signify four hundred and fifty-one pounds, seventeen shillings, and five pence, with intention to defraud the United States of America aforesaid, of seventy pounds, of lawful money of Pennsylvania, to the evil example of all others in like case offending, to the great damage of the said United States, and against, etc. (*Conclude as in book 1, chapter 3.*)

(268) *Forgery. Altering and defacing a certain registry and record, etc., under the Pennsylvania act of 1700.*(j)

That H. R., etc., at, etc., aforesaid, on, etc., being an evil disposed person, and devising, designing, and intending evil to the people of this commonwealth, under the pretext of examining the enrolments, registers, and records in the office of the surveyor-general of this commonwealth, on, etc., aforesaid, at the county aforesaid, with the intention to defraud and deceive one G. R., falsely, deceitfully, and corruptly in and on a certain registry and record, then and there being and remaining as a public record, in the office of the surveyor-general of this commonwealth, to wit, in book F., and on the page of the said book numbered one hundred and ninety-five, containing the list of returns made by him, the said H. R., while acting as deputy-surveyor of the surveyor-general of this commonwealth, did then and there falsely alter and deface the registry and records of said office and of this commonwealth, by a false and corrupt interlineation made in writing and figures, as follows, to wit, in the said book F., and on the page of said book numbered therein one hundred and ninety-five, and between the lines of writing on said page, counted from the upper line of said page, including the said upper line, numbers twenty-three and twenty-four:

(j) *Ream v. Com.*, 3 S. & R. 207. The judgment of the quarter sessions of Dauphin County, passing sentence on this indictment, was affirmed by the supreme court.

"April, 1794, H. R., in right of S. S., 161 acres and 95 perches." To the great damage of the said G., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(268a) *Forging will under English statute.*

That J. S., on, etc., at, etc., feloniously did forge a certain will and testament, purporting to be the last will and testament of one A. B., with intent thereby to defraud (certain persons to the jurors unknown), against, etc.(k)

(268b) *Making a false entry in a marriage register under English statute.*

— feloniously, knowingly, and unlawfully did insert ("*insert or cause to be inserted*") in a certain register of marriages, which was then by law authorized to be kept ("*any register of births, baptisms, marriages, deaths, or burials which now is or hereafter shall be by law authorized or required to be kept, etc., or any certified copy thereof*"), a certain false entry of a matter relating to a supposed marriage, and which said false entry is as follows: that is to say (*set it out verbatim, with innuendoes if necessary to explain it*); whereas in truth and in fact the said A. B. was not married to the said C. D. at the said church, on the said day of as in the said entry is falsely alleged and stated; and whereas, in truth and in fact the said A. B. was not married to the said C. D., at the said church or elsewhere, at the time in the said entry mentioned, or at any other time whatsoever; against the form, etc.

(*2d count for uttering.*)—feloniously did knowingly and wilfully offer, utter, dispose of, and put off a copy of a certain other false entry relating to a certain supposed marriage, which said last mentioned false entry was before then inserted in a certain register of marriages by law authorized to be kept, and which said last mentioned false entry is as follows: that is to say (*set it out*), whereas in truth and in fact (*as above*). And the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., at the time he so offered, uttered, disposed of, and put off the said

(k) Arch. C. P. 19th ed. p. 625. The judges were in *R. v. Tylney*, 1 Den. 319, equally divided on the question, whether, in the absence of the existence of some person who could have been defrauded by the forged will, a count charging an intent to defraud persons unknown could be sustained.

(270) *Second count, for uttering.(o)*

Feloniously did utter and publish(*p*) as true, a certain false, forged, and counterfeited bill of exchange, which said last mentioned false, forged, and counterfeited bill of exchange(*q*) is as follows, that is to say (*set out the bill as before*), with intention to defraud said A. S., he the said A. B., at the same time he so uttered and published the said last mentioned false, forged, and counterfeited bill of exchange as aforesaid, then and there, to wit, on, etc., at, etc., well knowing the same to be false, forged, and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(271) *Third count, for forging an acceptance.(r)*

That the said A. B., having in his possession a certain other bill of exchange, whose tenor follows, that is to say (*set out the bill*),* on, etc., with force and arms, at, etc., feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly act and assist in the false making, forging, and counterfeiting on the said last mentioned bill of exchange,** an acceptance of the said last mentioned bill of exchange, to the tenor following, that is to say, "Accepted R. G., Nov. 13th," with intent to defraud the said A. S., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(272) *Fourth count for uttering a forged acceptance, as in the last count to the *, and proceed:*

On which last mentioned bill of exchange was written a certain false, forged, and counterfeited acceptance of the said last mentioned bill of exchange, whose tenor follows, that is to say,

(o) See *Harrison v. State*, 36 Ala. 248.

(p) As to when there must be an averment of the party on whom the note was passed, see Wh. Cr. Pl. & Pr. 8th ed. § 740; notes to form 264, *supra*.

(q) Not necessary to aver indorsement, note to form 264, *supra*. *People v. Ah Woo*, 28 Cal. 205.

(r) It is usual, in a count of this kind, first to aver the date, direction, and other circumstances of the bill, and then set it out; but the first averments seem to be superfluous, and the above form is much more concise. It is not essential to set out the whole of the bill, since the acceptance only is alleged to have been forged. See *Stark. C. P.* 112, 113; notes to form 264, *supra*.

"Accepted R. G., Nov. 13th," on, etc., with force and arms, at, etc., feloniously did utter and publish as true the said last mentioned false, forged, and counterfeited acceptance of the said last mentioned bill of exchange, with intent to defraud the said A. S., he the said A. B., at the time of uttering and publishing as true the said last mentioned false, forged, and counterfeited acceptance of the said last mentioned bill of exchange, then and there, to wit, on, etc., at, etc., well knowing the said last mentioned false, forged, and counterfeited acceptance to be false, forged, and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(273) *Fifth count, for forging an indorsement, etc., as in the third count to the *, and proceed:*

An indorsement(s) of the said last mentioned bill of exchange, whose tenor follows, etc., that is to say, "S. R. and Son," with intent to defraud, etc. (*as before*).

(274) *Sixth count, for publishing a forged indorsement, etc.*

(*Same with that of the fourth count, substituting the indorsement and its tenor for the acceptance and its tenor*): against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(275) *For forgery at common law, in antedating a mortgage deed with intent to take place of a prior mortgage.(t)*

That whereas, a certain M. N., yeoman, on, etc., at, etc., was seized in his demesne as of fee of and in two certain lots or pieces of ground, one of them situate, lying, and being in Prince Street, in the borough of Lancaster, in Lancaster County aforesaid, containing, etc.; the other of which said lots, situate, etc., and that the said M. N., the same day and year aforesaid, at Lancaster County aforesaid, for a good and valuable consideration to him, the said M. N., by a certain A. K., before that time paid, did make and execute, seal, and deliver, to the said A. K.,

(s) See Stark. C. P. 116, 117; R. v. Biggs, 3 P. Wms. 419.

(t) This indictment, which was drawn in 1763, is signed by "Benj. Chew, attorney-general," but a note on a manuscript copy with which, among others, I have been furnished by Mr. Dillingham, of Philadelphia, states that it was "settled by Edward Shippen, deputy attorney-general," and afterwards chief justice. Whether the case is one of forgery, see Wh. Cr. Law, 8th ed. § 663.

a certain indenture and deed of mortgage, dated the same day and year aforesaid, wherein and whereby the said M. N. did grant, bargain, sell, aliene, release, and confirm unto the said A. K., his heirs and assigns, all those two adjacent lots or pieces of ground before mentioned and described, situate on Prince Street aforesaid, in the borough and county aforesaid, together with the houses and out-houses, edifices, and buildings thereon erected, and all and singular their appurtenances, to have and hold the same to the said A. K., his heirs and assigns forever, with a proviso in the same indenture contained, that if the same M. N., his heirs, executors, or administrators, should and did well and truly pay, or cause to be paid, to the said A. K., or his executors, administrators, and assigns, the sum of pounds, on the day of together with lawful interest for the same, then that indenture to be void, and the estate thereby granted to cease and determine (*here recite the proof or acknowledgment of the deed and enrolment, with the day, place, and book*), as by the said indenture, reference being thereunto had, more fully and at large appears.

And that M. R., of L., in Lancaster County, aforesaid, yeoman, and D. S., of the borough of Lancaster, in Lancaster County, attorney at law, well knowing the premises, and designing and fraudulently intending the said A. K. falsely and unlawfully to deceive and defraud, and with an intent to destroy, invalidate, and render of no effect the mortgage deed aforesaid, and to deprive the said A. K. of all benefit and advantage therefrom, and to lessen and destroy the security which the said A. K. had by the said mortgage deed, for the payment of the said sum of pounds, with the interest thereof, afterwards, to wit, the fourth day of November, A. D. 1763, at Lancaster County aforesaid, and within the jurisdiction of this court, with force and arms, knowingly, subtly, and falsely did forge and make, and cause to be forged and made, one false writing sealed, purporting to be an indenture of mortgage from the said M. N. to the said M. R., for the two lots of ground aforesaid, before granted and mortgaged as aforesaid, by the said M. N. to the said A. K., and purporting to bear date and to have been sealed and delivered, by the said M. N., on the fourth day of June, 1763, which same false and forged writing contains

the matter following, to wit, this indenture, etc. (*setting forth the same*), as by the said false and forged indenture fully appears.

And the inquest aforesaid do further present, that the said M. R. and D. S., the said fourth day of November, at Lancaster County aforesaid, fraudulently and deceitfully designing to defraud and supplant the said A. K., with an intent, that the said false and forged writing should invalidate, defeat, and become prior to the indenture of mortgage aforesaid of the said M. N., before that time made, sealed, and delivered to the said A. K. (the last mentioned indenture of mortgage being then and there in full force, and the moneys mentioned in the proviso aforesaid being unpaid to the said A. K., his attorney, or assigns), the same false and forged writing did antedate, and cause to be antedated, and to bear date on a day prior to the sealing and delivery of the indenture aforesaid, to the said A. K., to wit, on the fourth day of June aforesaid, and the said M. R. and D. S., on the fourth day of November aforesaid, at the county aforesaid, falsely, unlawfully, and deceitfully did prevail upon and procure the aforesaid M. N. to execute and acknowledge, sign, seal, and deliver, as his act and deed, the same false and forged writing, he the said M. N. then and there not knowing the same false writing to have been as aforesaid antedated, but believing the same to have borne date on the day of the execution and delivery of the same, to wit, on the fourth day of November aforesaid. And the inquest, etc., do further present, that the said M. R. and D. S., afterwards, to wit, the same fourth day of November, at Lancaster County aforesaid, with an intent the said A. K. to injure, cheat, deceive, and defraud, and to cause the aforesaid false and forged writing to invalidate, defeat, and become prior to the true, genuine, and lawful deed aforesaid, made and sealed as aforesaid, and delivered to the said A. K., the same false, forged, and antedated deed, as the true and genuine deed of the said M. N., by him made, executed, sealed, and delivered, on the fourth day of June aforesaid, falsely, unlawfully, knowingly, fraudulently, and deceitfully did publish, and cause to be published, when in truth the said M. R. and D. S. then and there well knew the said last mentioned writing to be false, forged, and antedated,

and not to have been sealed and delivered by him the said M. N. on the fourth day of June aforesaid, but on the fourth day of November aforesaid, to the great injury and deceit of the said A. K., to the evil example of all others in such case offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(275a) *Forgery of note under Indiana statute.*

The grand jurors for, etc., upon their oath present, that D. S., on, etc., at, etc., unlawfully, feloniously, and falsely did forge and counterfeit a certain promissory note for the payment of money, which said forged and counterfeit note is as follows, to wit, "\$200.00. Waterloo, Indiana, August 28th, 1876. Thirty days after date, we or either of us promise to pay to the order of the De Kalb Bank, two hundred dollars, with interest at ten per cent. per annum after maturity, the interest until maturity at that rate having been paid in advance, and ten per cent. attorney's fees, negotiable and payable at the De Kalb Bank, Waterloo, Indiana, value received, without any relief whatever from valuation or appraisement laws. The drawers and endorsers severally waive presentment for payment, protest, and notice of protest and non-payment of this note, and all defences on the ground of any extension of the time of its payment, that may be given by the holder or holders to them or either of them.

Due . No. .

John Shirrey,
John R. Walker,"

with intent to defraud J. I. B. and C. A. O. McC., who were doing business under the firm name of De K. Bank, contrary, etc.(u)

(276) *At common law. Against a member of a dissolved firm for forging the name of the firm to a promissory note.*

That D. G., late, etc., on, etc., and after the dissolution of the copartnership of the said D. G. and J. O., who had shortly before carried on trade and merchandise, under the name and firm of O. and G., at, etc., did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and

(u) This was held good on motion to quash in *Sharley v. State*, 54 Ind. 168.

counterfeited a certain promissory note, for the payment of money, signed by the said D. G. with the partnership names of O. and G., and purporting to have been signed by the said D. G. with the partnership name of O. and G. before the said partnership was dissolved, the tenor of which promissory note is as follows: “\$5000. Ninety days after date we promise to pay W. S., or order, five thousand dollars, at the State Bank at Elizabeth, without defalcation or discount, for merchandise rec’d, E. T., 30th December, 1812, O. and G.,” with intent to defraud the said J. O., and to render him liable to the payment of the said sum of money in the said note mentioned and made payable, contrary, etc.(v) (*Conclude as in book 1, chapter 3.*)

(277) *Forging a letter of attorney, at common law.*

That J. B., late of the said county, yeoman, on, etc., with force and arms, at the county aforesaid, falsely, fraudulently, and deceitfully did make, forge, and counterfeit a certain letter of attorney, purporting to be signed by one T. R., with the mark of him the said T. R., and to be sealed and delivered by him the said T. R., the tenor of which said letter of attorney is as follows (*here recite letter of attorney, verbatim et literatim*), with an intent to defraud the said T. R., against, etc. (*Conclude as in book 1, chapter 3.*)

(278) *Forgery of bill of exchange. First count, forging the bill.(w)*

That (defendant), on, etc., at, etc., feloniously, etc., did forge a certain bill of exchange, which said forged bill of exchange is as follows, that is to say: “£50. Bristol, 25th March, 1830. Three months after date pay to,” etc. etc. (*setting out the bill of*

(v) *State v. Gustine*, 2 Southard, 744. Mr. Hazley moved to quash: 1. For uncertainty and inconsistency. 2. Because the purport was incorrectly stated, it being stated to be signed by defendant, with partnership name of Ogden and Gustin, whereas it did not purport to be signed by D. Gustine. 2 East, 982. 3. Because partner before or after dissolution of partnership, may sign partnership name for a separate business, and not be liable to the pains of forgery. Chetwood answered, and referred to 2 Hawk. 344; 1 Mod. 78; 1 Str. 234, 241, 266; 1 Salk. 381; 1 Leach, 239, 410; 2 Str. 486; 2 Leach, 660. The court, Southard, J., dissenting, overruled the motion, and put the defendant to plead.

(w) Arch. C. P. 5th Am. ed. 444. This form is drawn under the stat. 11 Geo. IV. and 1 Wm. IV. c. 66, s. 3, which makes it felony to forge “any bill of exchange or promissory note for the payment of money.” For a more comprehensive form, see No. 269, etc.

exchange in words and figures correctly), with intent to defraud one J. N., against, etc. (*Conclude as in book 1, chapter 3.*)

(279) *Second count. Uttering the same.*

That the defendant “did offer, utter, dispose of, and put off” a certain other, etc. etc.

(280) *Third count. Forging an acceptance on the same.*

(*If the acceptance be also forged, add counts for it in this form*): And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the year and day last aforesaid, at the parish aforesaid, in the county aforesaid, having in his custody and possession a certain other bill of exchange, which said last mentioned bill of exchange is as follows, that is to say (*here set out the bill*), he the said J. S., afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did forge on the said last mentioned bill of exchange an acceptance (“any indorsement on, or assignment of, any bill of exchange, or promissory note for the payment of money, or any acceptance of a bill of exchange”) of the said last mentioned bill of exchange, which said forged acceptance is as follows, that is to say, “Accepted, payable at the bank of Messrs. C. & Co., J. G.” (*or as the acceptance may be*), with intent to defraud the said J. N., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(281) *Fourth count. Offering, etc., a forged acceptance.*

(*Same as the last, to the end of the copy of the bill of exchange, then as follows*): and on which said last mentioned bill of exchange was then and there written a certain forged acceptance of the said last mentioned bill of exchange, which said forged acceptance of the said last mentioned bill of exchange is as follows, that is to say (*here set out the acceptance as in the last count*), he, the said J. S., well knowing the premises last aforesaid, afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did offer, utter, dispose of, and put off the said forged acceptance of the said last mentioned bill of exchange, with intent to defraud the said J. N. (he the said J. S. at the time he so offered, uttered, dis-

posed of, and put off the said forged acceptance of the said last mentioned bill of exchange, then and there well knowing the said acceptance to be forged), against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*If an indorsement be also forged, add counts for it in this form.*)

Fifth count.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said J. S., afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, having in his custody and possession a certain other bill of exchange, which said last mentioned bill of exchange is as follows, that is to say (*here set out the bill*), he the said J. S., afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did forge on the back of the said last mentioned bill of exchange a certain indorsement of the said bill of exchange, which said forged indorsement is as follows, that is to say, "J. S. & Co.," with intent to defraud the said J. N., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(282) *Sixth count. Offering, etc., forged indorsement.*

(*Same as the last, to the end of the copy of the bill of exchange, then as follows:*) and on the back of which said last mentioned bill of exchange was then and there written a certain forged indorsement of the said last mentioned bill of exchange, which said last mentioned forged indorsement is as follows, that is to say, "J. S. & Co.," he the said J. S., well knowing the premises last aforesaid, afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did offer, utter, dispose of, and put off the said last mentioned indorsement of the said last mentioned bill of exchange, with intent to defraud the said J. N. (he the said J. S., at the time he so offered, uttered, disposed of, and put off the said last mentioned forged indorsement of the said last mentioned bill of exchange, then and there well knowing the said indorsement to be forged), against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(283) *For forging and publishing a receipt for payment of money.*(x)

That J. B., etc., on, etc., at, etc. (*averring forgery as in preceding forms*), a certain acquittance and receipt (y) for money, to wit, for the sum of three pounds and three shillings, in the words, letters, and figures following, that is to say, "August the 26th, 1781. Received of Mr. J. B. for Moustone quarry, the full sum of three pounds and three shillings. Received by me, T. F.," with intent to defraud the said T. F., etc., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(284) *Second count, for uttering.*

That the said J. B., etc., on, etc., at, etc., a certain false, forged, and counterfeited acquittance and receipt for money, to wit, for the sum of three pounds and three shillings, feloniously did utter and publish as true; which said last mentioned false, forged, and counterfeited acquittance and receipt is in the words, letters, and figures following, that is to say (*set out the receipt as before*), with intent to defraud the said T. F., he the said J. B., at the time when he so uttered and published the said last mentioned false, forged, and counterfeited acquittance and receipt, well knowing the same acquittance and receipt, so by him uttered and published, to be false, forged, and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(285) *Forging a receipt, under the North Carolina statute.*(z)

That J. S., late of the county of Johnston, in the state of North Carolina, on, etc., with force and arms, in the county of

(x) Stark. C. P. 457.

(y) Unless the instrument on the face of it appear to be a receipt, it must be shown by the aid of proper averments that it could so operate. Stark. C. P. 116, 117; *supra*, notes to form 264; *infra*, notes to form 415. See also Wh. Cr. Pl. & Pr. § 185.

(z) State v. Stanton, 1 Iredell, 424. "Upon the form of the indictment, the court would perhaps not be bound now to decide, since the other point disposes of the case here. But as the point may be material upon the next trial, and would, probably, soon arise in other cases, we deem it fit to state the opinion we have formed of it, with the view of settling the question. It would have been more satisfactory to us if in the books of criminal pleading or in an adjudication a precedent or a direct authority could have been found. We have, however, looked through the standard works on crown law, from Lord Coke's commentary on the statute 5 Elizabeth, c. 14, in the third institute, down to Mr. Chitty's treatise, and through many books of forms, without succeeding in finding an in-

Johnston aforesaid, feloniously did wittingly and falsely forge, make, and counterfeit, and did cause and procure to be falsely

dictment upon these words in that statute, 'show forth in evidence,' or a rule laid down upon them. This circumstance may not perhaps be deemed so very singular, when it is remembered that the same act contains also the words 'pronounce and publish,' which are more extensive, and include 'show forth in evidence.' This furnishes a reason why the indictment should always be for 'pronouncing and publishing,' and none for 'showing forth in evidence;' since, although every publication is not showing forth in evidence, yet showing forth in evidence is a publishing of it. Lord Coke saying that using any words, written or oral, whereby the instrument is set forth or held up as true, is 'to pronounce and publish it.' We have therefore only principle for our guide, and, being so guided, we have arrived at the conclusion that the second count is sufficient.

"In the first place, we adhere to Britt's case, 3 Dev. 122, that the words 'show forth in evidence,' refer to a judicial proceeding. The question then is, whether the particular proceeding must be set forth at large in the indictment, or may not be shown on evidence under the general words used in the statute and in this indictment.

"It seems to be proper, and perhaps may be said to be necessary, when an offence is created by statute, to describe it in the indictment, whether consisting of the commission or omission of particular acts, or of certain acts accompanied by a particular intent in the words of the statute. This is certainly so, unless for a word or phrase in the statute another is used in the indictment which is clearly of the same legal import, or has a broader sense including that in the statute. Of this exception, *R. v. Fuller* (1 B. & P. 180) is an example. But such examples are very rare; and on the contrary, the case of *Rex. v. Davis* (Leach, 493), and others of that kind, show how strictly the courts adhere to the letter of the law. Finding it thus to be generally true, that in describing the offence, the indictment must use all the words of the statute; so on the other hand, it would seem to be equally true as a general rule, that the indictment is sufficient if it contain all the words of the statute. When the language of the statute is transferred to the indictment, the expressions must be taken to mean the same thing in each. There can be few instances in which the same words thus used, ought to or can be received in a different sense in the one instrument from that in the other. As it is certain that the indictment was intended to describe the offence which the statute describes, it follows, from the use of the very same language in both, that the one means what the other does, neither more nor less. It is true that some few exceptions from this rule have been established by adjudications, but they have not appeared to us to embrace the present case. Thus, a statute may be so inaccurately penned, that its language does not express the whole meaning the legislature had; and by construction, its sense is extended beyond its words. In such a case, the indictment must contain such averments of other facts not expressly mentioned in the statute, as will bring the case within the true meaning of the statute; that is, the indictment must contain such words as ought to have been used in the statute, if the legislature had correctly expressed therein their precise meaning. In *State v. Johnson*, 1 Dev. 360, for example, it was held, that besides charging in the words of the act, that the prisoner, being on board the vessel, concealed the slave therein, the indictment should have charged a connection between the prisoner and the vessel, as that he was a mariner belonging to her; because that was the true construction of the act. So, where a statute uses a generic term, it may be necessary to state in the indictment the particular species in respect to which the crime is charged. As, upon a statute for killing or stealing 'cattle,' an indictment using only that word is not sufficient, but it ought to set forth the kind of cattle, as a horse or a cow. *R. v. Chalkeley*, R. & R. 258. But where a statute makes a particular act an offence,

made, forged, and counterfeited, and did willingly act and assist in the false making, forging, and counterfeiting a certain receipt, which said false, forged, and counterfeited receipt is as follows, that is to say, "received of J. S. thirty-five dollars and ninety-one cents, this 22d day of May, 1838, in part of the rent of land that I rented to him for the year 1837. W. W."

with intention to defraud one W. W., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

And the jurors aforesaid, upon their oath aforesaid, do further say and present, that the said J. S., afterwards, to wit, on, etc., in the county of Johnston aforesaid, feloniously did utter and publish as true, and show forth in evidence a certain other false, forged, and counterfeit receipt, which said last mentioned false, forged, and counterfeited receipt is as follows, that is to say, "Received of J. S. thirty-five dollars and ninety-one cents, this 22d day of May, 1838, in part of the rent of the land that I rented to him for the year 1837. W. W."

with intention to defraud the said W. W., he, the said J. S., at the time he so uttered and published, and showed forth in evidence the said last mentioned false, forged, and counterfeited receipt as aforesaid, then and there well knowing the same to be false, forged, and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

and sufficiently describes it by terms having a definite and specific meaning, without specifying the means of doing the act, it is enough to charge the act itself, without its attendant circumstances. Thus, upon a statute making it felony to endeavor to seduce a soldier from his duty, an indictment is good which charges such 'an endeavor,' without stating the mode adopted. Fuller's case, before cited. So, in the indictments founded on the words 'pronounce and publish,' in this same statute of Elizabeth (which are not ours), the precedents uniformly charge 'the pronouncing and publishing of the forged instrument as true,' without stating the means by which, or the person to whom it was published. Upon the more modern English statutes against 'putting off or disposing of' forged or counterfeit money or bank notes, it is also held, that the circumstances need not be stated. *Rex. v. Holden et al.*, 2 Taunt. 334. We do not perceive why the same principle does not apply to the other words 'show forth in evidence,' used in the act of Elizabeth, and in our act; and we are not aware of any disadvantage to the prisoner from the omission to set out in the indictment the particular proceeding in which the evidence was offered. We agree that such a judicial proceeding must be proved; and if it be not properly proved, the prisoner can put the matter on the record by an exception, and have the same benefit thereof on a motion to reverse the judgment, and for a *venire de novo*, that he could have from a motion in arrest of judgment. Hence we hold the second count in this indictment to be good."

(286) *Forging a fieri facias at common law.(a)*

That J. S., late, etc., on, etc., unlawfully and wickedly contriving to injure, oppress, impoverish, and defraud one J. N., then and there unlawfully, knowingly, and falsely did forge and counterfeit a certain writing on parchment, purporting to be a writ, of our lady the queen, of *fieri facias*, and to have issued out of the court of our said lady the queen of the bench at Westminster, in the county aforesaid; which said false, forged, and counterfeited writing is as follows, that is to say (*here set out the fieri facias verbatim*), with intent the said J. N. to injure, oppress, impoverish, and defraud, to the great damage of the said J. N., to the evil example of all others in the like case offending, and against, etc. (*concluding as in book 1, chapter 3*). (“*This count,*” remarks Mr. Archbold, “*appears to be sufficient, without stating that the writ was actually executed, or the prosecutor’s goods seized under it.*” However, it may be as well to add a second count, similar to the above, to the end of the statement of the *fieri facias*, and then continue :) with intent the said J. N. to injure, oppress, impoverish, and defraud. And the said J. S., afterwards, and before the said last mentioned pretended writ purported to be returnable, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, the said last mentioned false, forged, and counterfeited writing, knowingly, falsely, and deceitfully, as a true writ of our said lady the queen, of *fieri facias*, did cause to be delivered to the then sheriff of Middlesex, for execution to be made thereof; and afterwards, and before the last mentioned pretended writ purported to be returnable, to wit, on the day and year aforesaid, in the parish aforesaid, in the county aforesaid, did cause to be seized and taken divers goods and chattels of the said J. N. to a large amount, by pretence of the said pretended writ, to the great damage of the said J. N., to the evil example of all others in the like case offending, and against, etc. (*Conclude as in book 1, chapter 3*.)

(287) *Second count. Uttering same.*

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the day

(a) Archbold’s C. P. 5th Am. ed. 392.

and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, falsely, and deceitfully did utter and publish as a true writ of our lady the queen, of *feri facias*, a certain other false, forged, and counterfeited writing on parchment, purporting to be a writ of our said lady the queen, of *feri facias*, and to have issued out of the court of our said lady the queen of the bench at Westminster, in the county aforesaid; which said false, forged, and counterfeited writing is as follows, that is to say (*here set out the writ verbatim*), with intent the said J. N. to injure, oppress, impoverish, and defraud (he the said J. S., at the time he so uttered and published the said last mentioned false, forged, and counterfeited writing as aforesaid, then and there well knowing the same to be false, forged, and counterfeited). And the said J. S., afterwards, and before the said last mentioned pretended writ purported to be returnable, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, the last mentioned false, forged, and counterfeited writing, knowingly, falsely, and deceitfully, as a true writ of our lady the queen, of *feri facias*, did cause to be delivered to the then sheriff of Middlesex, for execution to be made thereof; and afterwards, and before the said last mentioned pretended writ purported to be returnable, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, did cause to be seized and taken divers goods and chattels of the said J. N. to a large amount, by pretence of the said pretended writ, to the great damage of the said J. N., to the evil example of all others in the like case offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(*Add counts describing the instrument, etc., in such manner as would sustain an indictment for stealing the same.*)

(288) *Forgery of a bond at common law.*(b)

That D. M. G., etc., late of, etc., on, etc., with force and arms, in, etc., of his own head and imagination, did wittingly and

(b) *State v. Gardiner*, 1 Ired. 27. Ruffin, C. J.: "As the grounds of the motion in arrest of judgment are not stated in the record, and the court has not had the assistance of counsel for the prisoner, it is possible we may have overlooked some point on which the motion ought to have been allowed. If so, it will be a source of sincere regret, for in the absence of counsel of his own selection, the court has endeavored to discharge for the prisoner that office which, as

falsely make, forge, and counterfeit, and did wittingly assent to the falsely making, forging, and counterfeiting a certain bond and writing obligatory in the words, letters, and figures, that is to say:—

“Four months after date, with interest from the date, we or either of us do promise to pay E. M., or order, the sum of twenty-four dollars and thirty-eight and three-quarter cents, for value received of him, as witness our hands and seals this 19th day of June, 1839.

“D. M'G., [Seal.]

A. G., [Seal.]

J. V., [Seal.]”

with intent to defraud the said E. M., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

a public duty, is devolved on us. After a careful examination of the record, we are unable so to discover any reason why the sentence of the law should not follow the conviction.

“In considering the case, however, one or two points have suggested themselves, on which it may be supposed an objection might have been taken, and on which, therefore, the court may properly give an opinion.

“As the name of the prisoner and that of one of the supposed obligors in the forged instrument appear to be the same, it may have been intended to present the question, whether the indictment can allege the forgery of the whole instrument by one of the parties to it. To that, we think, there would be several answers. One, that the objection ought to have been taken on the evidence, and cannot be taken in this manner, since it does not legally follow that the prisoner is the same person with the supposed obligor, although the names be the same. But admitting the identity of those persons, yet secondly, that it will not vitiate the indictment. The forgery may have consisted of alterations of a true instrument, as by making the sum mentioned in the bond more or less than it was at first, or by adding the names of the other two obligors without their knowledge or consent, and that of the obligee. Now, it is a settled rule, that in such cases the forgery may be charged specially, by alleging the alterations; or the forgery of the entire instrument may be charged; and this last will be supposed by evidence of the alterations. *R. v. Ellsworth*, 2 East, P. C. 986, 988. After the alterations, the instrument as a whole, is a different instrument from what it was; and therefore, in its altered state, is a forgery for the whole. Possibly, the prisoner's counsel meant to object to the indictment, as a repugnancy, that it charges the forgery of a certain *bond*; whereas if it be a forgery, it is not a bond, but only purports to be such. But that objection, too, would be untenable. The statute uses the same language: ‘forge any deed, will, bond, etc. ;’ and while it is prudent, so it is generally safe, to follow in the indictment the words of the statute. Besides, upon looking to the precedents, in books of criminal pleading, it is found, that in this respect the present indictment conforms to those long settled.

“Without further lights as to the points intended to be relied on for the prisoner, the court is therefore under the necessity of saying, that there is no error in the judgment, and directing the steps necessary to its execution.”

(289) *At common law, by separating from the back of a note an indorsement of part payment.*(c)

That J. M'L., of, etc., on, etc., with force and arms, at, etc., did wittingly, falsely, and deceitfully forge and alter, and did procure to be forged and altered a certain promissory note, of the tenor following, that is to say:—

“BARNET, *August 21st, 1821.*

“For value received, we jointly and severally promise to pay J. M'L., or his order, sixty dollars, to be paid in beef cattle, the 1st Oct. 1822, or grain, the 1st Jan. 1823, with interest.

“E. C.

R. M.

“Attest, H. A. R.”

On the back of which promissory note, was then and there indorsed twenty dollars, in part payment thereof. And the said J. M'L., said indorsement then and there being on the back of said note, and the balance of said note being then and there due, and no more, with force and arms, wittingly, falsely, and deceitfully did alter said note, by then and there wittingly, falsely, and deceitfully separating said indorsement from said note, with intent to defraud and deceive the said E. C. and R. M., to the great damage of the said C. and M., to the evil example of others in like cases offending, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(290) *Forgery in altering a peddler's license, at common law.*(d)

That G. K., late, etc., on, etc., having been recommended by the court of general quarter sessions of the peace and gaol delivery in and for the county of as a proper person for the employment of a hawker or peddler, within this state, did obtain, receive, and have a license for that purpose, from the supreme executive council of this commonwealth, under the hand of the honorable C. B., esquire, then and still being vice-president of the same council, and under the seal of the state,

(c) See *State v. M'Lenan*, 1 Aik. 312; where this form was held good at common law.

(d) Drawn in 1787 by Mr. Bradford, then attorney-general of Pennsylvania. See as to forms for altering, *infra*, 317, etc.

which license was in the words following, to wit, "By the supreme executive council, etc.: whereas, G. K., the bearer hereof, intending to follow the business of a peddler, within this commonwealth of Pennsylvania, hath been recommended to us as a proper person for that employment, and requesting a license for the same, we do hereby license and allow the said G. K. to employ himself as a peddler and hawker within the said commonwealth, to travel with one horse, and to expose and sell divers goods, wares, and merchandises, until, etc., one thousand seven hundred and eighty-six, provided he shall during the said term observe and keep all laws and ordinances of the said commonwealth to the said employment relating. Given under the seal, etc. C. B., V. P."

And that he the said G. K., so being in possession of the said license, afterwards, to wit, on, etc., at, etc., with force and arms, etc., the said license falsely, fraudulently, and deceitfully did alter, and cause to be altered, by falsely and deceitfully erasing the word *six* in the said license, and in the place thereof falsely and deceitfully did make, forge, and add the word *seven*, whereby the said license so altered as aforesaid, purporting to be given, etc., was made to extend, etc., with intent to defraud the said commonwealth and to deceive the citizens thereof, to the evil example of all others, and against, etc. (*Conclude as in book 1, chapter 3.*)

(291) *Forgery of a note which cannot be particularly described in consequence of its being destroyed.*(e)

That, etc., at, etc., on, etc., devising and intending to cheat and defraud one D. C. of his goods and moneys, did falsely and fraudulently forge and counterfeit a certain negotiable promissory note, for the payment of money, purporting to be made by the said D. C., payable to one A. S. B., which said false, forged, and counterfeited negotiable promissory note is to the purport following, that is to say:—

"Ninety days after date, I promise to pay to A. G. B., or

(e) See *People v. Badgeley*, 16 Wend. 53; where the fact of the destruction of the note, as here set forth, was held to supersede the necessity of pleading it according to its precise form. For other cases of forgery of lost documents see *supra*, notes to form 264.

order, fourteen hundred and twenty-eight dollars, value received. May, 1833. D. C. (indorsed), A. S. B.:" a more particular description of which is now here to the jurors unknown, said note being destroyed: with intent to cheat and defraud the said C. D., etc.

(292) *Forgery of a note whose tenor cannot be set out on account of its being in defendant's possession.*

That A. B., etc., at, etc., falsely and fraudulently did forge and counterfeit a certain promissory note, for the payment of money, purporting to be made by one A. B., payable on demand, to one C. D., the tenor of which note is to this inquest unknown, by reason that the said A. B., having the said note in his possession and custody, hath altogether refused and still doth refuse to produce the same, and to permit the same to be inspected by this inquest, although thereto often requested, to wit, by the (attorney-general of the commonwealth), at and before the sitting of this inquisition, but which said note was in substance as follows (*here set forth the substance of the note and conclude as in last precedent*).

(293) *Forgery of bond when forged instrument is in defendant's possession.(f)*

That J. K., etc., on, etc., at, etc., did falsely and feloniously make, forge, and counterfeit, and did then and there willingly and feloniously aid and assist in the false making, forging, and counterfeiting, of a certain false, forged, and counterfeited bond and writing obligatory for the payment of money, bearing date on some day and year to the jurors aforesaid unknown, in a penal sum to the jurors aforesaid unknown, with a condition thereunder written for the payment of a certain sum to the jurors aforesaid unknown, with interest thereon, to the said J. K. (the defendant), purporting to have been executed by one G. B., late of, etc., which said false, forged, and counterfeited bond and writing obligatory for the payment of money, is in

(f) *People v. Kinsley*, 2 Cow. 522. The second count in this indictment charged the defendant with destroying the alleged forged bond on some day to the jurors unknown, and the third count was for uttering the same. Judgment was entered upon the verdict of the jury, the court adopting the principles of *Com. v. Houghton*, 8 Mass. 373.

the possession and custody of the said J. K. (the defendant), with intent to defraud one J. C., against, etc. (*Conclude as in book 1, chapter 3.*)

(294) *Forgery in Pennsylvania at common law, in passing counterfeit bank notes.*(g)

That the said J. S., on the same day and year aforesaid, at the county aforesaid, with force and arms, having in his custody and possession a certain other false, forged, and counterfeited paper writing, partly written and partly printed, purporting to be a true and genuine promissory note for the payment of money, called a bank note of the Bank of North America,(h) and purporting to be signed by J. N., president, and also by the cashier of the said bank, the tenor of which said last mentioned, false, forged, and counterfeited paper writing, partly written and partly printed, purporting to be a true and genuine promissory note for the payment of money, called a bank note of the Bank of North America, is as follows, that is to say:—

“X. I promise to pay to D. C., or bearer, on demand, 10”
ten dollars. Philadelphia, 26th of February, 1808, n.
2467, e. 614. For the president, directors, and company of the Bank of North America.

“10 H. D., Jr., Cash. J. N., Pres’t. X”
falsely, illegally, knowingly, fraudulently, and deceitfully did utter and publish, as a true and genuine promissory note for the payment of money, called a bank note of the Bank of North America, the said last mentioned false, forged, and counterfeited paper writing, partly written and partly printed, purporting to be a true and genuine promissory note for the payment of money, called a bank note of the Bank of North America, he the said J. S., at the time of uttering and publishing the same, then and there well knowing the same to be false,

(g) *Com. v. Searle*, 2 Binn. 332. The then Pennsylvania act of assembly, making penal the passing of counterfeit bank notes, used the expression “passing” alone, and consequently this count, independently of the want of the conclusion against the statute, was held not to comprehend the statutory misdemeanor. It was sustained, however, at common law, and it is on this principle that indictments in Pennsylvania at common law, for forging and uttering counterfeit notes of foreign banks, rest. See next form.

(h) As to the averment of incorporation, see Wh. Cr. Pl. & Pr. § 110; Wh. Cr. L. 8th ed. § 741; *supra*, notes to form 2 and form 264.

forged, and counterfeited, with intent to defraud, etc.,⁽ⁱ⁾ to the evil example of all others in like case offending, and against, etc.

(295) *Forgery of the note of a foreign bank as a misdemeanor at common law.*

That A. B., late of, etc., on, etc., with force and arms, did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, a certain note in imitation of, and purporting to be, a note issued by the order of the president, directors, and company of (*stating the bank*),^(j) for the sum of dollars, purporting to be signed by president and cashier, payable to or bearer, on demand, dated one thousand eight hundred and which said falsely made, forged, and counterfeited note, partly written and partly printed, is in the words and figures following: (*setting forth the note*), with intent to defraud the said (*if there be proof of the incorporation of the bank, or the charter is one of which the court takes judicial notice, you can point the intent at it, if not, at the party to whom the note was probably meant to be passed; a general intent to defraud the people of the state or district will do when no particular intent can be shown*),^(k) against, etc. (*Conclude as in book 1, chapter 3.*)

And the inquest aforesaid, upon their respective oaths and affirmations aforesaid, do further present, that the said A. B., on the day and year aforesaid, at the county and within the jurisdiction aforesaid, with force and arms, then and there did pass, utter, and publish, and attempt to pass, utter, and publish, as true, a certain false, forged, and counterfeit note, purporting to be a note issued by the said (*as in last count*), for the sum of dollars, signed by president, and cashier, payable to or bearer, on demand, and dated one thousand eight hundred and which said false, forged, and counter-

(i) As to intent, see Wh. Cr. L. 8th ed. § 741; *supra*, notes to form 264.

(j) See notes to form 264.

(k) See *People v. Stearns*, 2 Wend. 409. See next form for the general methods of stating intent in such cases. An intent to defraud A. & B. is sustained by proof of an intent to defraud A. *Veasie's case*, 7 Greenl. 131; *People v. Curling*, 1 Johns. R. 320; *R. v. Hanson*, 1 C. & M. 334. See notes to form 264.

feited note, partly written and partly printed, is in the words and figures following, to wit (*setting forth note*), the said A. B., then and there well knowing the said note to be as aforesaid false, forged, and counterfeit, with intent to defraud (*the party on whom it was passed*), against, etc. (*Conclude as in book 1, chapter 3.*)

(296) *Forging a bank note, and uttering the same, under English statute.*(*l*)

That J. B., late of, etc., laborer, heretofore, that is to say, on, etc., with force and arms, at, etc., feloniously did forge and counterfeit(*m*) a certain bank note,(*n*) the tenor(*o*) of which said forged and counterfeited bank note is as followeth, that is to say (*the note is here set out verbatim*),(*p*) with intent(*q*) to defraud the governor and company of the Bank of England,(*r*) against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(297) *Second count. Putting away same.*

That the said J. B., heretofore, that is to say, on, etc., with force and arms, at, etc., did dispose of and put away(*s*) a certain forged and counterfeited bank note, the tenor of which said last mentioned forged and counterfeited bank note is as followeth, that is to say,(*t*) with intent to defraud the governor and company of the Bank of England, he the said J. B., at the said time of his so disposing of and putting away the said last mentioned

(*l*) This form is found in Starkie's C. P. 452.

(*m*) These are the words of the statute; it is unnecessary to allege that he did falsely forge and counterfeit. This count is framed upon the stat. 45 Geo. III. c. 89, s. 2.

(*n*) It is essential to show that the instrument forged is of the description prohibited by the statute. See notes to form 264. As to the averments which are necessary, when the forged writing does not purport to be of the kind prohibited, see Stark. C. P. 113.

(*o*) As to the words by which the instrument is usually introduced, see Stark. C. P. 109; Lyon's case, Leach, 696; *supra*, notes to form 264, etc.

(*p*) As to the accuracy with which the forged writing should be set out, see *supra*, notes to form 264.

(*q*) See Stark. C. P. 121, 122, 199, as to the general necessity for averring an intent to defraud in case of perjury, the form of the averment, and the effects of variance.

(*r*) As to averment of charter of bank, see Wh. Cr. Pl. & Pr. § 110; *supra*, notes to forms 2, 264.

(*s*) According to the words of the act 45 Geo. III. c. 89, s. 2.

(*t*) Setting out the note.

forged and counterfeited bank note, then and there, to wit, on, etc., at, etc., well knowing such last mentioned note to be forged and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(298) *Third count. Forging promissory note.*

Feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly act and assist in the false making, forging, and counterfeiting a certain promissory note for the payment of money, the tenor of which said last mentioned false, forged, and counterfeited note is as followeth, that is to say (*note, as before*), with intention to defraud the governor and company of the Bank of England, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(299) *Fourth count. Putting away same.*

Feloniously did dispose of and put away a certain false, forged, and counterfeited promissory note for the payment of money, the tenor of which said last mentioned false, forged, and counterfeited note is as followeth, that is to say (*note, as before*), with intent to defraud the governor and company of the Bank of England, he the said J. B., at the said time of his so disposing of and putting away the said last mentioned false, forged, and counterfeited note, then and there, to wit, on, etc., at, etc., well knowing the said last mentioned note to be false, forged, and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(300) *Fifth count. Same as first, with intent to defraud J. S.*

Feloniously did forge and counterfeit a certain other bank note, the tenor of which said last mentioned forged and counterfeited bank note is as followeth, that is to say (*note, as before*), with intent to defraud one J. S., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(301) *Sixth count. Putting away same.*

Feloniously did dispose of and put away a certain forged and counterfeited bank note, the tenor of which said last mentioned

forged and counterfeited bank note is as followeth, that is to say (*note, as before*), with intent to defraud the said J. S., he the said J. B., at the time of his so disposing of and putting away the said last mentioned forged and counterfeited bank note, then and there, to wit, on, etc., well knowing such last mentioned note to be forged and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(302) *Seventh count. Same as second, with intent to defraud J. S.*

Feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly act and assist in the false making, forging, and counterfeiting a certain other promissory note for the payment of money, the tenor of which said last mentioned forged and counterfeited note is as followeth, that is to say (*note, as before*), with intention to defraud the said J. S., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(303) *Eighth count. Putting away same.*

Feloniously did dispose of and put away a certain other false, forged, and counterfeited promissory note for payment of money, the tenor of which said last mentioned false, forged, and counterfeited note is as followeth, that is to say (*note, as before*), with intention to defraud the said J. S., the said J. B., at the said time of his so disposing of and putting away the said last mentioned false, forged, and counterfeited note, then and there, to wit, on, etc., well knowing the same last mentioned note to be false, forged, and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(304) *Attempt to pass counterfeit bank note, under Ohio statute.*

That A. B., on the day of in the year of our Lord one thousand eight hundred and in the county of Hamilton aforesaid, did unlawfully attempt to pass to one M. N., with intent then and there to defraud the said M. N., a certain forged and counterfeited bank note, as a true and genuine bank note of the Bank of Corning, given for the payment of ten dollars, which aforesaid forged and counterfeited bank note then and there was of the tenor and effect following, to wit:—

Secured by the pledge of public
stocks and real estate.

“STATE OF NEW YORK,
No. 2269.
TEN TEN
The Bank of Corning
Will pay ten dollars to the Bearer
on demand. Corning, March 9, 1854.
TEN
S. MALLORY, *Cash'r.* H. W. BOSTWICK, *Pres't.*”

Countersigned and registered in the De-
partment. D. H. CARPENTER, Register.

he, the aforesaid A. B., then and there well knowing the afore-
said forged and counterfeited bank note to be forged and
counterfeited; the true and genuine of which said bank notes
then circulated in this state as and for money.(u)

(305) *Forging a certificate granted by a collector of the customs.(v)*

The jurors of the United States of America, within and for
the circuit and district aforesaid, on their oath present, that
late of the city and county of New York, in the circuit
and district aforesaid, heretofore, to wit, on, etc., with
force and arms, at the city of New York, in the southern district
of New York aforesaid, and within the jurisdiction of this court,
feloniously did falsely make, forge, and counterfeit a certain
official document, granted by a collector of customs by virtue of
his office, to wit, an official document granted by the collector of
the customs for the port and district of the city of New York
[insert averment to the effect that the collector, as such, was charged
with the duties of supervisor of the revenue], which said false, forged,
and counterfeited official document is as follows, that is to say
(here insert the document as altered), with intent to defraud one
against, etc., and against, etc. (Conclude as in book 1,
chapter 3.)

(u) Warren's C. L. 247.

(v) This form was approved by the district court for the southern district of
New York, and was held bad in the circuit court, for want of an averment that
the collector had been charged with the duties of supervisor of the revenue. See
U. S. v. Schoyer, 2 Bl. C. C. 59. By making the necessary averment, in con-
formity with the act of congress, the form in the text may be sustained.

Second count.

(*Same as first count substituting*): “with intent to defraud some person or persons to the jurors aforesaid unknown,” for “with intent to defraud one .”

(306) *Third count. Causing and procuring forgery, etc.*

And the jurors aforesaid, on their oath aforesaid, do further present, that late of the city and county of New York in the circuit and district aforesaid, heretofore, to wit, on etc., with force and arms, at the city of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly aid and assist in falsely making, forging, and counterfeiting a certain official document, granted by a collector of customs by virtue of his office (*insert here averment in brackets as in first count*), to wit, an official document granted by the collector of the customs for the port and district of the city of New York, which said false, forged, and counterfeited official document is as follows, that is to say (*as in first and second counts mentioned*), with intent to defraud one against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Fourth count.

(*Same as third count, substituting*): “with intent to defraud some person or persons to the said jurors unknown,” for “with intent to defraud one .”

(307) *Fifth count. Altering, etc.*

And the jurors aforesaid, on their oath aforesaid, do further present, that late of the city and county of New York, in the circuit and district aforesaid, heretofore, to wit, on, etc., with force and arms, at the city of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, feloniously did falsely alter a certain official document granted by a collector of the customs by virtue of his office, to wit, a certain official document granted by the collector of the customs for the port and district of the city of New York (*insert here*

avermment in brackets, as before), which said falsely altered official document is in the words following, that is to say (*here repeat the document as altered, word for word*), with intent to defraud the United States of America, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Sixth count.

(*Same as fifth count, substituting*): “with intent to defraud one _____,
,” for “with intent to defraud the United States of America.”

Seventh count.

(*Same as sixth count, substituting*): “with intent to defraud some person or persons to the jurors aforesaid as yet unknown,” for “with intent to defraud one _____.”

(308) *Eighth count. Altering, etc., averring specially the alterations.*

And the jurors aforesaid, on their oath aforesaid, do further present, that _____ late of the city and county of New York, in the circuit and district aforesaid, _____ heretofore, to wit, on, etc., having in his possession a certain official document granted by a collector of the customs by virtue of his office (*insert avermment in brackets in first count*), to wit, an official document granted by the collector of the customs for the port and district of the city of New York, which said official document, granted as aforesaid, was, when so granted, in the words and figures following, that is to say (*here insert complete copy of original document, before any alterations were made in it*), he the said _____ then and there, that is to say, on, etc., with force and arms, at, etc., and within the jurisdiction of this court, feloniously did falsely alter the said official document, by then and there falsely altering (*v*) the figure _____ before written in the number _____ in the said official document, and by falsely altering the figure _____ before written in _____ in the said official document, and by then and there falsely making, forging, and counterfeiting upon the said official document, in the place of the said figure _____ before written in the said number _____ in the said official document,

(*v*) The nature of the alteration must be stated. *Mount. v. Com.*, 1 Duvall (Ky.), 90. Wh. Cr. L. 8th ed. § 180; *supra*, notes to § 264.

the figure and by then and there falsely altering in the place of the said figure in before written in said in the said official document the figure by reason and by means of which said false alteration of the said figure and of the said figure and of falsely making, forging, and counterfeiting upon the place of the said figure the figure and upon the place of the said figure the figure the said number before written in the said official document did become, import, and signify and the said before written in the said official document, did become, import, and signify (*or otherwise, according to the peculiarities of the document*), which said falsely altered official document is in the words and figures following, that is to say (*here insert the document as altered*), with intent to defraud one against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(309) *Ninth count. Same in another shape.*

And the jurors aforesaid, upon their oath aforesaid, do further present, that late of the city and county of New York, in the circuit and district aforesaid, hertofore, to wit, on, etc., having in his possession a certain official document granted by a collector of the customs by virtue of his office, to wit, an official document granted by the collector of the customs for the port and district of the city of New York (*insert here averment in brackets in first count*), which said official document, granted as aforesaid, was, when so granted, in the words and figures following, that is to say (*insert document as in eighth count*), he the said then and there, that is to say, on, etc., aforesaid, with force and arms, at the city of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, feloniously did falsely alter the said official document, by then and there falsely altering, etc. (*as eighth count specified*), which said falsely altered official document is in the words and figures following, that is to say (*here insert copy of document as altered*), with intent to defraud some person or persons to the jurors aforesaid unknown, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(310) *Tenth count. Uttering certificate as forged.*

And the jurors aforesaid, on their oath aforesaid, do further present, that late of the city and county of New York, in the circuit and district aforesaid, heretofore, to wit, on, etc., with force and arms, at the city of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, feloniously did pass, utter, and publish a certain false, forged, and counterfeited official document, purporting to be granted by a collector of the customs by virtue of his office, to wit, an official document, purporting to be granted by the collector of the customs for the port and district of the city of New York (*insert here averment in brackets in first count*), by virtue of his office, which said falsely altered official document is as follows, that is to say (*here insert copy of document as altered*), with intent to defraud the United States, he the said at the time of his so passing, uttering, and publishing the said last mentioned falsely altered official document, then and there, to wit, on, etc., at the said city of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, well knowing such last mentioned official document to be falsely altered as aforesaid, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Eleventh count.

(*Same as tenth count, substituting*): “with intent to defraud one ,” for “with intent to defraud the United States.”

Twelfth count.

(*Same as eleventh count, substituting*): “with intent to defraud some person or persons to the jurors aforesaid as yet unknown,” for “with intent to defraud one .”

(311) *Thirteenth count. Uttering certificate as altered.*

And the jurors aforesaid, on their oath aforesaid, do further present, that late of the city and county of New York, in the circuit and district aforesaid, heretofore, to wit, on, etc., with force and arms, at the city of New York, in the circuit and district aforesaid, and within the jurisdiction of this

court, feloniously did attempt to pass, utter, and publish a certain falsely altered official document, purporting to be granted by a collector of the customs by virtue of his office, to wit, purporting to be an official document granted by the collector of the customs for the port and district of the city of New York (*insert here averment in brackets in first count*), which said falsely altered official document is as follows, that is to say (*here insert a copy of the document as altered*), with intent to defraud the United States of America, he the said at the said time of his so passing, uttering, and publishing the said last mentioned falsely altered official document, then and there, to wit, on, etc., at the city of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, well knowing such last mentioned official document to be falsely altered, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Fourteenth count.

(*Same as thirteenth count, substituting*): "with intent to defraud one ," for "with intent to defraud the United States of America."

Fifteenth count.

(*Same as fourteenth count, substituting*): "with intent to defraud some person or persons to the jurors aforesaid as yet unknown," for "with intent to defraud one ."

(312) *Forging a treasury note.*

Southern District of New York, ss. The jurors of the United States of America, within and for the circuit and district aforesaid, on their oath present, that late of the city and county of New York, in the circuit and district aforesaid, heretofore, to wit, on, etc., with force and arms, at the city of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, feloniously did falsely make, forge, and counterfeit a certain treasury note, which said false, forged, and counterfeited treasury note is as follows, that is to say (*here insert a perfect copy of the note as counterfeited*), on which said note was indorsed " ," with intent to defraud the United States of

America, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

(*Same as first count, substituting*): “with intent to defraud one
,” for “with intent to defraud the United States of
America.”

Third count.

(*Same as second count, substituting*): “with intent to defraud
some person or persons to the jurors aforesaid unknown,” for
“with intent to defraud one .”

(313) *Fourth count. Causing and procuring, etc.*

And the jurors aforesaid, on their oath aforesaid, do further
present, that late of the city and county of New York,
in the circuit and district aforesaid (*state occupation*), heretofore,
to wit, on, etc., with force and arms, at the city of New York,
in the circuit and district aforesaid, and within the jurisdiction
of this court, feloniously did falsely make, forge, and counter-
feit, and cause and procure to be falsely made, forged, and
counterfeited, and willingly aid and assist in falsely making,
forging, and counterfeiting, a certain instrument, for the pay-
ment of money, called a treasury note, which said last men-
tioned false, forged, and counterfeited instrument, for the pay-
ment of money, called a treasury note, is as follows (*insert copy
of note as in preceding counts*), on which said note was then and
there indorsed “,” with intent to defraud the United States
of America, against, etc., and against, etc. (*Conclude as in book
1, chapter 3.*)

(314) *Fifth count. Altering, etc.*

And the jurors aforesaid, on their oath aforesaid, do further
present, that late of the city and county of New York,
in the circuit and district aforesaid, heretofore, to wit,
on, etc., having in his possession a certain treasury note, in the
words, letters, and figures following, that is to say (*insert copy
of note as in preceding counts*), which said note was indorsed
“,” he the said then and there, that is to say, on,

etc., with force and arms, at the city of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, feloniously did alter, forge, and counterfeit the said treasury note, by then and there falsely obliterating and defacing the figures (or otherwise), before written in in the said treasury note, and by then and there falsely making, forging, and counterfeiting upon the said treasury note, in the place of the said before written in in the said treasury note, the by reason and by means of which said obliterating and defacing of the said in the said treasury note, and of falsely making, forging, and counterfeiting upon the place of the said in said treasury note, the the said before written in in said treasury note, did become, import, and signify which altered, forged, and counterfeited treasury note is as follows, that is to say (*here insert a complete copy of the note as in preceding counts*), on which said note was indorsed “ ,” with intent to defraud the United States of America, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(315) *Sixth count. Passing note, etc.*

And the jurors aforesaid, on their oath aforesaid, do further present, that late of the city and county of New York, in the circuit and district aforesaid, heretofore, to wit, on, etc., with force and arms, at the city of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, feloniously did pass, utter, and publish a certain false, forged, and counterfeited treasury note, which said false, forged, and counterfeited treasury note is as follows, that is to say (*here insert copy of treasury note as in preceding counts*), on which said note was indorsed “ ,” with intent to defraud the United States of America, he the said at the time of his so passing, uttering, and publishing the said last mentioned false, forged, and counterfeited treasury note, then and there, to wit, on, etc., at the city of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, well knowing such last mentioned treasury note to be false, forged, and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Seventh count.

(Same as sixth count, substituting): "with intent to defraud one _____," for "with intent to defraud the United States of America."

(316) *Eighth count. Same as sixth, in another shape.*

And the jurors aforesaid, on their oath aforesaid, do further present, that _____ late of the city and county of New York, in the circuit and district aforesaid, _____ heretofore, to wit, on, etc., with force and arms, at the city of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, feloniously did pass, utter, and publish a certain false, forged, and counterfeited treasury note, of which the purport is as follows, that is to say (*here insert a correct and complete copy of the treasury note as counterfeited*), which said note was then and there indorsed " _____," with intent to defraud some person or persons to the jurors aforesaid as yet unknown, he the said _____ at the time of his so passing, uttering, and publishing the said last mentioned false, forged, and counterfeited treasury note, then and there, to wit, on, etc., at the said city of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, well knowing such last mentioned treasury note to be false, forged, and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Last count.

And the jurors aforesaid, on their oath aforesaid, do further present, that the southern district of New York, in the second circuit, is the circuit and district in which the said _____ was first apprehended for the said offence.(x)

(317) *Feloniously altering a bank note.(y)*

That A. B., etc., on, etc., at, etc., having in his possession a bank note, whose tenor follows, that is to say (*set out the note*), feloniously did alter the said bank note by then and there(z)

(x) See *supra*, 3-16, 181, n., 287-239.

(y) Stark. C. P. 458.

(z) See *Mount v. Com.*, 1 Duvall, 90.

falsely obliterating and defacing the letters *een* before printed in the word *fifteen* in the said blank note, and also the letters *een* before printed in the word *fifteen*, in white letters, on a black ground underneath the said bank note, and by then and there falsely making, forging, and counterfeiting upon the said bank note, in the place of the first mentioned letters *een* before printed in the word *fifteen* in the said bank note, the letter *y*; and also by then and there falsely making, forging, and counterfeiting upon the bank note, in the place of the said letters *een*, before printed in the word *fifteen*, in white letters, on a black ground underneath the said bank note, another letter *y*, by reason and means of which said obliterating and defacing the letters *een*, before printed in the said word *fifteen* in the said bank note, and also the letters *een*, being before printed in the said word *fifteen*, in white letters, on a black ground underneath the said bank note, and of falsely making, forging, and counterfeiting upon the place of the said letters *een*, before printed in the word *fifteen*, in and underneath the said bank note the letter *y*; the letters *fift*, so remaining of the said word *fifteen*, before printed in the said bank note, with the said first mentioned letter *y*, so falsely made, forged, and counterfeited as aforesaid, did become, import, and signify *fifty*; and the letters *fift*, so remaining of the said *fifteen* before printed in white letters on a black ground underneath the said last mentioned bank note, with the said other *y*, so falsely made, forged, and counterfeited as aforesaid, did become, import, and signify *fifty*, which said altered bank note is in the words, letters, and figures following, that is to say (*set out the note as altered*), with intent to defraud, etc.(a)

(318) *Having in possession forged bank notes without lawful excuse, knowing the same to be forged.*(b)

That defendant, etc., feloniously, knowingly, and wittingly, and without lawful excuse, had in his possession and custody divers forged and counterfeited bank notes, that is to say, one forged

(a) Allege in one count an intention to defraud the governor and company of the Bank of England; in another, an intention to defraud the person to whom it is paid, etc.; add other count alleging the forgery of the bank note as altered, and for altering with intent to defraud, etc. See *supra*, forms 302, 303.

(b) Stark C. P. 454.

and counterfeited bank note, the tenor of which said forged and counterfeited bank note is as follows, that is to say (*here the note is set out*), and one other forged and counterfeited bank note, the tenor of which said last mentioned forged and counterfeited bank note is as follows, that is to say (*here the other note is set out*), he the said A. B. then and there, to wit, on, etc., at, etc., well knowing the same notes to be forged and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

Feloniously, knowingly, wittingly, and without lawful excuse, had in his possession and custody a certain other forged and counterfeited bank note, the tenor of which said last mentioned forged and counterfeited bank note is as followeth, that is to say (*the first note in the preceding count is here set out again*), he the said A. B., then and there, to wit, on, etc., at, etc., well knowing the same last mentioned note to be forged and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(319) *Uttering and passing a counterfeit bank bill, under § 4, ch. 96 of revised statutes of Vermont.*(c)

That A. B., etc., on, etc., at, etc., wittingly, deceitfully, and unlawfully did utter, pass, and give in payment to one E. W. F., of Mendon, in the state of Vermont, one certain false, forged, and counterfeited bank note, which said note was made in imitation of, and did then and there purport to be, a bank note for the sum of five dollars, issued by the president, directors, and company of the Bank of Cumberland, by and under the authority of the legislature of the state of Maine, one of the United States of America, made payable to S. B., or bearer, on demand, numbered two hundred and seventy-four, and dated the first day of September, in the year of our Lord one thousand eight hundred and thirty-five, with the name of S. E. C. thereto subscribed as president of said bank, and the name of C. C. T. countersigned thereon as cashier of said bank, and was in the words and figures following, that is to say:—

(c) Sustained in *State v. Wilkins*, 17 Vt. 151.

“The State No. 974 of Maine.

“The President, Directors, and Company of the Bank of Cumberland, promise to pay Five Dollars to S. B., or bearer, on demand.

Portland, 1st Sept., 1835.

"C. C. T., *Cash'r.*

S. E. C., *Pres't.*"

He, the said A. B., then and there well knowing the said note to be false, forged, and counterfeited as aforesaid, with intent to defraud the said E. W. F., contrary, etc. (*Conclude as in book 1, chapter 3.*)

(320) *Uttering forged order, under Ohio statute.*

That A. B., on the twenty-seventh day of July, in the year of our Lord one thousand eight hundred and fifty-three, in the county of Cuyahoga aforesaid, feloniously did utter and publish as true and genuine, one certain false and forged order in writing, for the payment of money, which said false and forged order in writing is of the tenor and effect following, that is to say:—

"CLEVELAND, *July* 27, '53.

"Mr. Ransom, Please pay T. Donley \$11.30, and charge Schr. Fletcher. E. GOFFET."

E. GOFFET."

with intent thereby then and there to prejudice, damage, and defraud one Chancy S. Ransom; he, the said A. B., at the time when he so uttered and published the said false and forged order, then and there well knowing the same to be false and forged.(d)

(321) *Passing forged order, under Ohio statute.*

That A. B., on the thirty-first day of August, in the year of our Lord one thousand eight hundred and fifty-two, in the county of Hamilton aforesaid, did unlawfully falsely utter, publish, and put off to one M. N., a certain false, forged, and counterfeited order, as a true and genuine order of O. P., given for the payment of six dollars, which aforesaid forged order then and there was of the tenor and effect following, to wit:—

(d) Warren's C. L. 249.

"August 31st, A. D. 1852.

"Mr. M—— N——, Sir, Please to let the bearer, or order, have six dollars, and oblige yours, O—— P——." with the intent then and there to prejudice, damage, and defraud the said M. N., he the said A. B., then and there well knowing the said false, forged, and counterfeited order to be false, forged, and counterfeited.(e)

(322) *Uttering a forged note purporting to be issued by a bank in another state, under the Vermont statute.*

That J. S., of, etc., in said county of Windsor, on, etc., with force and arms, at, etc., wittingly, falsely, deceitfully, and unlawfully did utter, pass, and give in payment to one A. L., of, etc., one certain false, forged, and counterfeit bank note, which said note was made in imitation of, and did then and there purport to be a bank note for the sum of two dollars, issued by the President, Directors, and Company of the Suffolk Bank, a banking company incorporated by and existing under the authority of the legislature of the state of Massachusetts, one of the United States, made payable to E. C., or bearer, on demand, numbered one thousand four hundred and ninety-one, and dated Boston, May third, one thousand eight hundred and forty-three, with the name of H. B. S. thereto subscribed as president of said bank, and the name of J. V. B. countersigned thereon as cashier of said bank, and was in the words and figures following, that is to say (*here set forth the note*), he the said J. S. well knowing, then and there, the said note to be false, forged, and counterfeited as aforesaid, with intent to defraud the said A. L., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(323) *Having counterfeit bank note in possession under Ohio statute.*

That A. B. and C. D., on the second day of February, in the year of our Lord one thousand eight hundred and fifty-five, in the county of Cuyahoga aforesaid, were detected with having unlawfully in their possession two hundred forged and counterfeited bank notes, purporting to be issued by the Mechanics' Bank in

(e) Warren's C. L. 249.

Rhode Island, for the payment of five dollars each, which said forged and counterfeited bank notes are as follows, that is to say:

“ Rhode Island.

FIVE	5	THE MECHANICS' BANK	
		Will pay Five Dollars on demand to the bearer.	5
	M. M.	Newport, October 20, 1854.	

C. D. Hammet, *Cash*. Isaac Gould, *Pres.*”
for the purpose and with the intent to sell, barter, and dispose of the said forged and counterfeit bank notes.(f)

(324) *Having in possession counterfeit plates, under Ohio statute.*

That A. B. and C. D., on the tenth day of September, in the year of our Lord one thousand eight hundred and forty-four, at the county of Hamilton aforesaid, did unlawfully and knowingly have in their possession, and then and there secretly did keep a certain plate, then and there designed and engraved for the purpose of striking and printing false and counterfeited bank notes, to wit, for the purpose then and there of striking and printing false and counterfeited bank notes in the likeness and similitude of the true and genuine bank notes of the Bank of Tennessee, of the denomination of twenty dollars, and which said plate then and there was etched and engraved, amongst other things, with the words and figures following, to wit:—

“ No. — No. —, B. B. — Capital five millions.

Nashville, —, 18—. The Bank of Tennessee promises to pay Twenty Dollars to the Bearer, on demand.

“ —, Cash'r. —, Pres't.”

which said plate they, the said A. B. and the said C. D., then and there well knew to be designed and engraved then and there for the purpose of striking and printing false and counterfeited bank notes as aforesaid, and which said plate they, the said A. B. and C. D., then and there so had in their possession, and then and there secretly kept as aforesaid, for the purpose then and there of striking and printing false and counterfeited bank notes.(g)

(f) Warren's C. L. 258.

(g) Warren's C. L. 266. This was sustained in *State v. Sasser*, 13 Ohio, 453.

(325) *Secretly keeping counterfeiting instruments, under Ohio statute.*

That A. B., C. D., E. F., G. H., I. J., and K. L., on the twenty-seventh day of April, in the year of our Lord one thousand eight hundred and thirty-eight, at the said county of Huron, did knowingly and wilfully have in their possession, and secretly keep one bogus, one press, one pressing machine, one stamping machine, one set of dies, one pair of dies, one die, other two dies, two milling machines, two edging machines, two sets of milling bars, two pairs of milling bars, two moulds, two crucibles, two files, two rasps, ten iron bands, ten iron bolts, five steel punches, and five steel pins, the same then and there being instruments for the purpose of counterfeiting certain coins of silver, called Mexican dollars, the said coins of silver then being coins of silver currently passing in the said state of Ohio, as and for money.^(h)

(326) *Having in possession counterfeit bank notes, under Ohio statute.*

That A. B. and C. D., on the tenth day of September, in the year of our Lord eighteen hundred and forty-four, at the county of Hamilton, aforesaid, did unlawfully and falsely have in their possession, and then and there were detected with so having in their possession, divers, to wit, five hundred, false, forged, counterfeited, and spurious bank notes, then and there made as and for true and genuine bank notes of the Merchants' and Mechanics' Bank of Wheeling, of the denomination of five dollars, one of which said false, forged, counterfeited, and spurious bank notes then and there was of tenor and effect following, to wit:—

“No. 402.

B.

The Merchants' and Mechanics' Bank of Wheeling
will pay Five Dollars on Demand to J. Gill, or bearer,
at its Banking House, Wheeling, Va. June 9th, 1843.

“S. Brady, *Cash'r.*

R. C. Woods, *Pres't.*”

which said false, forged, counterfeited, and spurious bank notes, they, the said A. B. and C. D., then and there well knew to be false, forged, counterfeited, and spurious; and which said false, forged, counterfeited, and spurious bank notes, they, the said A. B. and C. D., then and there had in their possession for the pur-

pose then and there of selling, bartering, and disposing of the same.(i) (*Conclude as in book 1, chapter 3.*)

(327) *Having in possession forged note of United States Bank, under the Vermont statute.(j)*

That W. R., late of Franklin, in the county of Franklin aforesaid, heretofore, that is to say, on, etc., with force and arms, at Franklin aforesaid, in the county of Franklin aforesaid, feloniously and unlawfully did have in his possession, with an intention to utter, pass, and give in payment, one certain false, forged, and counterfeited bank note, which said note was made in imitation of, and did then and there purport to be, a bank note for the sum of ten dollars, issued by the president, directors, and company of the Bank of the United States, made payable at their office of discount and deposit in Charleston, to J. J., president thereof, or to the bearer, on demand, numbered three thousand and fourteen, and dated at Philadelphia the twentieth day of January, in the year of our Lord one thousand eight hundred and twenty-three, with the name of L. C. thereto subscribed, as president of said bank, and the name of T. W. countersigned thereon as cashier of said bank, and was in the words and figures following, that is to say (*here the bill was set forth verbatim*). He the said W. R. then and there well knowing the said note to be false, forged, and counterfeited as aforesaid, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(328) *Forgery, etc., in New York. Having in possession a forged note of a corporation.*

That A. B., late of the ward of the city of New York, in the county of New York aforesaid, on, etc., with force and

(i) Warren's C. L. 259. Sustained by Supreme Court of Ohio in *State v. Sasser*, 13 Ohio, 453.

(j) *State v. Randal*, 2 Aik. 89. "In this case it was held that the offences of counterfeiting bills of the Bank of the United States, of passing, and of knowingly having in possession such counterfeits with intent to pass them, are cognizable by the courts of this state, under the statute of this state against counterfeiting, notwithstanding the congress of the United States, in virtue of the eighth section of the first article of the constitution, have legislated on the subject, and given to the courts of the United States jurisdiction of the same offences.

"The jurisdiction of the United States courts under the acts of congress, and of the courts of this state under the statute of Vermont, over those offences, are concurrent within this state."

arms, at the ward of the city of New York, in the county of New York aforesaid, feloniously had in custody and possession, and did receive from some person or persons to the jurors aforesaid unknown, a certain forged and counterfeited negotiable promissory note, for the payment of money, commonly called a bank note, purporting to have been issued by a certain corporation or company called (*setting out the name*), duly authorized for that purpose by the laws of, etc., which said last mentioned false, forged, etc., and counterfeited negotiable promissory note for the payment of money is as follows, that is to say (*setting out the note*), with intention to utter and pass the same as true, and to permit, cause, and procure the same to be so uttered and passed, with the intent to injure and defraud one (*setting out the party*), and divers other persons to the jurors aforesaid unknown, he the said then and there well knowing the said last mentioned false, forged, and counterfeited promissory note, for the payment of money, to be false, forged, and counterfeited as aforesaid, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(329) *Second count. Uttering the same.*

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B., etc., afterwards, to wit, on the day and year last aforesaid, with force and arms, at the ward, city, and county aforesaid, feloniously and falsely did utter and publish as true, with intent to injure and defraud the said C. D., etc., and divers other persons to the jurors aforesaid unknown, a certain other false, forged, and counterfeited negotiable promissory note for the payment of money, commonly called a bank note, purporting to have been issued by a certain corporation or company called (*giving name*), duly authorized for that purpose by the laws of which said last mentioned false, forged, and counterfeited negotiable promissory note for the payment of money is as follows, that is to say (*setting forth note as above*), the said A. B., at the same time so uttered and published the said last mentioned false, forged, and counterfeited negotiable promissory note for the payment of money as aforesaid, then and there well knowing the same to be

false, forged, and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(330) *Forging an instrument for payment of money, under the New York statute.*

That A. B., late of the ward of the city of New York, in the county of New York aforesaid, etc., on, etc., with force and arms, at the ward, city, and county of New York aforesaid, feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly act and assist in the false making, forging, and counterfeiting a certain for payment of money which said false, forged, and counterfeited for payment of money is as follows, that is to say (*setting forth the instrument*), with intent to injure and defraud (*setting forth the persons to be defrauded*), and divers other persons to the jurors aforesaid unknown, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(331) *Second count. Uttering the same.*

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B., etc., afterwards, to wit, on the day and year last aforesaid, with force and arms, at the ward, city, and county aforesaid, feloniously and falsely did utter and publish as true, with intent to injure and defraud the said C. D., etc., and divers other persons to the jurors aforesaid unknown, a certain false, forged, and counterfeited for payment of money, which said last mentioned false, forged, and counterfeited for payment of money is as follows, that is to say (*setting forth the instrument as above*), the said A. B., etc., at the said time he so uttered and published the said last mentioned false, forged, and counterfeited for payment of money as aforesaid, then and there well knowing the same to be false, forged, and counterfeited, against, etc., and against etc. (*Conclude as in book 1, chapter 3.*)

(332) *Having in possession forged notes, etc., with intent to defraud, under the New York statute.*(k)

That, etc., on, etc., at, etc., feloniously had in his custody and possession, and did receive from some person or persons to the jurors aforesaid unknown, a certain false, forged, and counterfeited negotiable promissory note for the payment of money, commonly called a bank note, purporting to have been issued by a certain corporation or company called the Morris Canal and Banking Company, duly authorized for that purpose by the laws of the state of New Jersey, which said last mentioned false, forged, and counterfeited negotiable promissory note for the payment of money is as follows (*setting forth note verbatim et literatim*), with intention to utter and pass the same to be true, and to permit, cause, and procure the same to be so uttered and passed, with the intent to injure and defraud said Morris Canal and Banking Company, etc.; he the said S. D. then and there well knowing the said note to be false, forged, and counterfeited, against, etc. (*Conclude as in book 1, chapter 3.*)

(333) *Forgery of a note of a bank incorporated in Pennsylvania, under the Pennsylvania statute.*(l)

That A. B., late of said county, on, etc., at the county aforesaid, and within the jurisdiction of this court, with force and arms, feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, a certain note in imitation of, and purporting to be, a note issued by the order of the president, directors, and company of (*setting out the name of the bank*), for the sum of dollars, purporting to be signed by president, and cashier, payable to or bearer, on demand, dated one thousand eight hundred and the said bank then and there being a bank within this commonwealth, incorporated in pursuance of an act of the general assembly, which said falsely made, forged, and counterfeited note, partly written and partly printed, is in

(k) *People v. Davis*, 2 Wend. 309.

(l) For forging the notes of a foreign bank, the above form is good at common law, striking out the word "feloniously," the averment of the charter of the bank, and charging the intent to be to defraud the persons actually defrauded, or to defraud persons unknown. See, for form of same, *supra*, 295.

the words and figures following (*setting out the note*), with intent to defraud the said bank, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(334) *Second count. Passing same.*

That, etc., A. B., etc., on, etc., at, etc., feloniously did pass, utter, and publish, and attempt to pass, utter, and publish as true, a certain false, forged, and counterfeit note, purporting to be a note issued by the said (*setting forth the bank as in first count*), for the sum of dollars, signed by president, and cashier, payable to or bearer, on demand, and dated one thousand eight hundred and the said then and there, being a bank within this commonwealth, incorporated in pursuance of an act of the general assembly; which said false, forged, and counterfeit note, partly written and partly printed, is in the words and figures following, to wit (*setting out the note*), the said A. B. then and there well knowing the said note to be as aforesaid false, forged, and counterfeit, with intent to defraud (*the party to whom the note was passed*), contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(335) *Forgery of the note of a bank in another State, under the Virginia statute.(m)*

That A. B., of the county of Cabell, a certain false, forged, and counterfeit note, purporting to be a note of the Bank of Louisville, for five dollars, feloniously did pass as a true bank note for five dollars to one C., of the following tenor (*setting forth note*), with intent to defraud the said C., and with intent also to defraud the corporation of the president, directors, and company of the Bank of Louisville, he the said A. B., at the time of passing the said false, forged, and counterfeit bank note, well knowing the same to be false, forged, and counterfeited, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(*Second count in like form, only charging the passing of a different counterfeit note of the same bank to C., with intent to defraud C.*)

(m) Sustained in *Com. v. Murray*, 5 Leigh, 720.

(336) *For making, forging, and counterfeiting, etc., American coin, under act of congress.*(n)

That A. B., etc., on, etc., at, etc., feloniously did falsely make, forge, and counterfeit pieces of coin, of and other mixed metals (*or otherwise*), in the resemblance and similitude of coin, called a which said coin, called a had before the said, etc., of, etc., been coined at the mint of the United States, with intent to defraud some person or persons to the jurors aforesaid unknown, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(337) *Second count. Same, averring time of coining.*

That the said A. B., on, etc., at, etc., feloniously did falsely make, forge, and counterfeit pieces of and other mixed metals, in the resemblance and similitude of coin, called which said coin, called after, etc., and before, etc., had been coined at the mint of the United States of America, with intent to defraud some person or persons to the jurors aforesaid unknown, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(338) *Third count. Passing, etc.*

That the said A. B., on, etc., at, etc., feloniously did pass, utter, and publish as true, pieces of false, forged, and counterfeited coin, of metal in the resemblance and similitude of coin, called a which after, etc., and before, etc., had been coined at the mint of the United States of America, with intent to defraud some person or persons to the jurors aforesaid unknown, he the said at the time he so passed, uttered, and published as true the said last mentioned false, forged, and counterfeited well knowing the same to be false, forged, and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(n) This indictment is of the character in use in New York, in the United States court. The forms No. 341 and 342, which have been sustained by the circuit court in Philadelphia, are much more concise, and equally accurate.

(339) *Fourth count. Same in another shape.*

That the said A. B., on, etc., at, etc., feloniously did pass, utter, publish, and sell as true pieces of false, forged, and counterfeited coin, in the resemblance and similitude of coin, called a which said coin, called had before, etc., been coined at the mint of the United States of America, intending by such passing, uttering, publishing, and selling as true, the said pieces of false, forged, and counterfeited coin, to defraud some person or persons to the jurors aforesaid unknown, he the said at the time he so passed, uttered, published, and sold as true the said last mentioned false, forged, and counterfeited pieces of coin, then and there well knowing the same to be false, forged, and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

• (340) *Fifth count. Same, specifying party to be defrauded.*

That the said A. B., on, etc., at, etc., feloniously did pass, utter, and publish as true pieces of false, forged, and counterfeited coin, of metal in the resemblance and similitude of coin, called a which after, etc., and before, etc., had been coined at the mint of the United States of America, with intent to defraud one he the said at the time he so passed, uttered, and published as true the said last mentioned false, forged, and counterfeited well knowing the same to be false, forged, and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Sixth count.

That the said A. B., on, etc., at, etc., feloniously did pass, utter, publish, and sell as true pieces of false, forged, and counterfeited coin, in the resemblance and similitude of the coin of the United States of America, called which said coin, called had before, etc., been coined at the mint of the United States, with intent to defraud one he the said at the time he so passed, uttered, published, and sold as true the said last mentioned false, forged, and counterfeited pieces of coin, then and there well knowing the

same to be false, forged, and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Seventh count.

(*Same as sixth count, except instead of*): “did pass, utter, publish, and sell as true,” *insert* “did attempt to pass, utter, publish, and sell as true,” *and for* “with intent to defraud one _____,” *insert* “with intent to defraud some person or persons to the jurors aforesaid unknown.”

Eighth count.

(*Same as seventh count, except instead of*): “had before, etc., been coined, etc.,” *insert* “had after, etc., and before, etc., been coined, etc.”

Ninth count.

That the said A. B., on, etc., at, etc., _____ other pieces of coin, resembling, and intended to resemble and pass for the coin of the United States of America, commonly known by the name of and called _____ of the value of _____ feloniously did attempt to pass, utter, and publish, which said coin called _____ after, etc., and before, etc., had been coined at the mint of the United States of America, with the intent to defraud one _____ he the said _____ at the time he so attempted to pass, utter, and publish the said last mentioned false, forged, and counterfeited _____ pieces of coin, then and there well knowing the same to be false, forged, and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Last count.

(*Same as ninth count, except that instead of*): “after, etc., and before, etc.,” *insert* “before, etc.”

(*For final count, see ante, 17, 18, 181, n., 239, n.*)

(341) *Counterfeiting half dollars under act of congress.*(o)

That A. B., etc., late, etc., on, etc., with force and arms, unlawfully and feloniously did falsely make and counterfeit, and

(o) See act of cong. April 21, 1806; 2 Sts. at Large, 404. Act of cong. March 3, 1825; 4 Sts. at Large, 121, § 20, etc.

cause and procure to be falsely made, forged, and counterfeited, and willingly aid and assist in falsely making, forging, and counterfeiting, one coin in the resemblance and similitude of the silver coin which has been coined at the mint of the United States, called a half dollar, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(342) *Passing counterfeit half dollars, with intent to defraud an unknown person, under act of congress.*(p)

That A. B., etc., late, etc., on, etc., with force and arms, unlawfully and feloniously did pass, utter, and publish, and attempt to pass, utter, and publish as true, a certain false, forged, and counterfeited coin in the resemblance and similitude of the silver coin which has been coined at the mint of the United States, called a half dollar, he the said then and there knowing the same to be false, forged, and counterfeited, with intent to defraud a certain person to the grand inquest aforesaid unknown, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(343) *Second count. Same, with intent to defraud R. K.*

That the said A. B., on, etc., at, etc., with force and arms, unlawfully and feloniously did pass, utter, and publish, and attempt to pass, utter, and publish as true, a certain other false, forged, and counterfeited coin, in the resemblance and similitude of the silver coin which has been coined at the mint of the United States, called a half dollar, he the said then and there knowing the same to be false, forged, and counterfeited, with intent to defraud one R. K., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see ante, 17, 18, 181, n., 239, n.*)

(344) *Having coining tools in possession, at common law.*(q)

That A. B., late of the county aforesaid, yeoman, being a per-

(p) Act of cong. April 21, 1806; 2 Sts. at Large, 404. Act of cong. March 3, 1825; 4 Sts. at Large, 121, § 20.

(q) Drawn in 1787, by Mr. Bradford, the attorney general of Pennsylvania, afterwards attorney general of the United States.

son of ill name and fame, and of dishonest life and conversation, and intending the faithful citizens of this commonwealth to cheat, deceive, and defraud, the day, etc., at stamps (*made of wood, iron, or whatever it be*), upon which was then and there made and impressed the figure, resemblance, and similitude of a good and genuine bill of credit, emitted and made current by the resolves of the honorable continental congress, and which same stamp would then make and impress the figure, resemblance, and similitude of a good and genuine bill of credit, aforesaid, without any lawful authority or excuse for that purpose, knowingly and unlawfully had in his custody and possession, with an intent to impress, forge, and counterfeit the bills of credit aforesaid, and to pass, utter, and pay such forged and counterfeit bills of credit to the faithful subjects of this commonwealth and the United States of America, to the evil example of all others in like case offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(344a) *Having die for counterfeiting in possession.*

The jurors for, etc., upon their oath present, that W. F. H., on, etc., one die, in and upon which said die was then and there made and impressed the figure and apparent resemblance of one of the sides, that is to say, the obverse side of the queen's current gold coin called a sovereign, knowingly and without lawful excuse, feloniously had in the custody and possession of him the said W. F. H., against the form of the statute, etc.

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. F. H., on, etc., in the year aforesaid, one die, in and upon which said die was then and there made and impressed the figure and apparent resemblance of one of the sides, that is to say, the reverse side of the queen's current gold coin called a sovereign, knowingly and without lawful excuse, feloniously had in the custody and possession of him the said W. F. H., against the form of the statute, etc.(r)

(345) *Making, forging, and counterfeiting, etc., foreign coin, quarter dollar, under act of congress.(s)*

That A. B., etc., on, etc., at, etc., pieces of false, forged, and counterfeited coin, each piece thereof resembling and intended to resemble and pass for a quarter of a Spanish milled dollar (*or otherwise*), (the quarter of a Spanish milled dollar then and there being a foreign silver coin, in actual use and circulation as money within the said United States), feloniously did falsely make, forge, and counterfeit, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(346) *Second count. Procuring forgery.*

That the said A. B., heretofore, on, etc., at, etc., pieces of false, forged, and counterfeited coin, each piece thereof resembling and intended to resemble and pass for a quarter of a Spanish milled dollar (the quarter of a Spanish milled dollar then and there being a foreign silver coin, in actual use and circulation as money within the said United States), feloniously did cause and procure to be falsely made, forged, and counterfeited, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

(*Same as second count, except instead of*): "feloniously did cause and procure to be falsely made, forged, and counterfeited," *insert* "feloniously did willingly aid and assist in falsely making, forging, and counterfeiting."

Fourth count.

(*Same as third count, except instead of*): "feloniously did willingly aid and assist in falsely making, forging, and counterfeiting," *insert* "feloniously did utter as true, for the payment of money, with intent to defraud some person or persons to the jurors aforesaid as yet unknown, he the said then and there knowing the said last mentioned pieces of coin to be false, forged, and counterfeited."

(s) The defendant in this case pleaded guilty.

Fifth count.

(*Same as fourth count, substituting*): “with intent to defraud one ,” for “with intent to defraud some person or persons to the jurors aforesaid, as yet unknown.”

(*For final count, see 17, 18, 181, n., 239.*)

(347) *Passing, uttering, and publishing counterfeit coin of a foreign country, under act of congress, specifying party to be defrauded.*

That A. B., etc., on, etc., at, etc., did feloniously pass, utter, and publish as true, pieces of false, forged, and counterfeited coin, in the resemblance and similitude of the coin called the dollar of Mexico (*or otherwise*), which, before the said on, etc., had been by law made current in the said United States, he the said knowing at the time he so passed, uttered, and published the said pieces of false, forged, and counterfeited coin, that the same were false, forged, and counterfeited, and intended by such passing, uttering, and publishing, to defraud one of the said city of New York, in the circuit and district aforesaid, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said A. B., etc., on, etc., at, etc., other pieces of false, forged, and counterfeited coin, in the resemblance and similitude of the foreign coin (*if such is the case*), called the of which, before the said on, etc., had been by law made current in the said United States, feloniously did pass, utter, and publish as true, he the said knowing at the time he so passed, uttered, and published as true, the said pieces of false, forged, and counterfeited coin last aforesaid, that the same were false, forged, and counterfeited, and intending by such passing, uttering, and publishing, to defraud some person or persons to the said jurors unknown, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

(*Same as second count, substituting*): “and intending by such passing, uttering, and publishing, to defraud one of the

city of New York, in the circuit and district aforesaid" (*or otherwise*), for "and intending by such passing, uttering, and publishing, to defraud some person or persons to the said jurors unknown."

Fourth count.

That the said A. B., on, etc., at, etc., other pieces of false, forged, and counterfeited coin, in the resemblance and similitude of the coin called the of a foreign coin which, before the said on, etc., by an act of the congress of the United States of America, entitled, "An act regulating the currency of foreign gold and silver coin in the United States," approved on the third day of March, in the year of our Lord one thousand eight hundred and forty-three, had been made current in the said United States, feloniously did pass, utter, and publish as true, he the said knowing at the time he so passed, uttered, and published as true the said pieces of false, forged, and counterfeited coin, that the same were false, forged, and counterfeited, and intending by such passing, uttering, and publishing, to defraud one of the city and county of New York, in the circuit and district aforesaid, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Last count.

(*For final count, see 17, 18, 181, n., 239.*)

(348) *Debasing the coin of the United States, by an officer employed at the mint, under act of congress.*(*t*)

That A. B., on, etc., at, etc., being then and there a person and officer employed at the mint of the United States, at aforesaid, did debase and make worse certain pieces, to wit, ten pieces of gold coin called eagles (which had been struck and coined at the said mint of the United States), as to the proportion of fine gold therein contained, and which were then and there by the said A. B., he being such person and officer employed in the said mint of the said United States as aforesaid, made of less weight and value than the same ought to be

by the provisions of the several acts and laws of the said United States relative thereto, through the default and connivance of the said A. B., he being then and there such person and officer employed as aforesaid in the said mint, for the purpose of unlawful profit and gain, and with an unlawful and fraudulent intent to debase, make worse, and render of no value the aforesaid ten pieces of gold coin, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239.*)

(349) *Fraudulently diminishing the coin of the United States, under act of congress.*(u)

That A. B., etc., on, etc., at, etc., did unlawfully, fraudulently, and for gain's sake, impair, diminish, falsify, scale, and lighten certain pieces, to wit, ten pieces, of gold coin called eagles, which had been coined at the mint of the United States, with intent to defraud some person to the said jurors unknown, against, etc., and contrary, etc.(v) (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239.*)

(350) *Uttering a counterfeit half guinea, at common law.*(w)

That defendant, on, etc., at, etc., one piece of false money made of base metals, and colored with a certain wash producing the color of gold, to the likeness and similitude of a piece of good, lawful, and current gold money and coin of this realm, called a half guinea, unlawfully, unjustly, and deceitfully did utter and pay to one C. D., for and as a piece of good and lawful gold money and coin of this realm, called half a guinea, he the said A. B., then and there well knowing the said piece to be false and counterfeit as aforesaid, to the great damage of the said C. D., and against, etc. (*Conclude as in book 1, chapter 3.*)

(u) Davis's Prec. 138. Act of 21st April, 1806, § 3; Gordon's Dig. art. 3631, p. 711.

(v) If the coin debased was foreign gold or silver, then say, "which said gold coin were ten pieces of foreign gold coin, which were by the laws of the United States made current, and were in actual use and circulation as money, within the said United States."

(w) Stark. C. P. 447.

(351) *Passing counterfeit coin similar to a French coin, at common law.*

That M.B., late of, etc., on, etc., at, etc., one false, forged, and counterfeited piece of pewter, lead, and other base and mixed metals, composed in form, similitude, and likeness of a silver French crown (the same silver French crown then and still being a silver French coin current and passing in circulation in this state), for and as a good, true, and genuine French silver crown, to a certain J. J., then and there did pass, pay away, utter, and tender in payment, he the said M. then and there well knowing the same piece to be so as aforesaid false, forged, and counterfeited, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(352) *Counterfeiting United States coin, under the Vermont statute.(x)*

That the respondent, at Weybridge, "with intent the good people of this state and of the United States to deceive and defraud, with force and arms, on the tenth day of April, A. D. 1845, ten pieces of false, forged, and counterfeit coin and money, of pewter, lead, tin, and zinc, and other mixed metals, in the similitude of the good, legal, and current money and silver coins of the United States, which are current by law and usage in this state, called 'half dollars,' then and there unlawfully and feloniously did forge, make, and counterfeit, contrary," etc. (*Conclude as in book 1, chapter 3.*) (*The second count was for having in*

(x) *State v. Griffin*, 18 Vt. 198. "The statute," it was said, "on which the third count rested, is intended to reach every part of the apparatus of coining, however much more might be necessary to make that effective, and that, therefore, if it be shown that the respondent had in his possession one-half of a mould, it is sufficient, without proof that he also had the other half.

"The allegation, in the indictment, that the respondent, 'ten pieces of false, forged, and counterfeit coin and money,' etc., 'unlawfully and feloniously did forge, make, and counterfeit,' etc., was held sufficient. The ambiguity, it was said, arises only from the different sense in which the word 'counterfeit' is used."

An indictment for having in possession counterfeit coin, it was ruled, need not aver that the denomination of coin which was counterfeited was "current by law, or usage, in this state," it being averred, that the coin was one of the current silver coins of the United States. The court will take judicial notice that the current coins of the United States are current also in this state.

In such indictment it is not necessary to aver of what materials the counterfeit coin was made; and if averred it need not be proved.

possession counterfeit coin, with intent to pass the same. The third count was for having in possession divers moulds and patterns, adapted and designed for making counterfeit coin, with intent to use the same in coining counterfeit half dollars.)

(353) *Having in possession coining instruments, under the Rev. Sts. of Massachusetts, ch. 127, § 18.(y)*

That A. B., at, etc., on, etc., did knowingly have in his possession a certain mould, pattern, die, puncheon, tool, and instrument adapted and designed for coining and making one side of a counterfeit coin, in the similitude of one side or half part of a certain silver coin, called a half dollar, to wit, that side or half part thereof, which represents a spread eagle, and has the words, "United States of America — Half Dollar;" said coin, called a half dollar, being current by law and usage in this state and commonwealth aforesaid, with intent to use and employ the said mould, pattern, die, puncheon, tool, and instrument, and cause and permit the same to be used and employed, in coining and making such false and counterfeit coin as aforesaid, etc.

(354) *Having in possession ten counterfeit pieces of coin with intent to pass the same, under Rev. Sts. of Mass. ch. 127, § 15.(z)*

That, etc., at, etc., on, etc., had in his custody and possession, at the same time, ten similar pieces of false and counterfeit coin, of the likeness and similitude of the silver coin current within this commonwealth, by the laws and usages thereof, called Mexican dollars, with intent then and there the said pieces of false and counterfeit coin to utter and pass as true, he the said

(y) *Com. v. Kent*, 6 Met. 221. In this case it was held that under the Rev. Sts. ch. 127, § 19, providing for the punishment of a person who shall knowingly have in his possession any instrument adapted and designed for coining or making counterfeit coin, with intent to use the same, or cause or permit the same to be used, in coining or making such coin, a person is punishable for so having in his possession, with such intent, an instrument adapted and designed to make one side only of a counterfeit coin.

On the trial of a party who is indicted for knowingly having in his possession an instrument adapted and designed for coining or making counterfeit coin, with intent to use it, or cause or permit it to be used, in coining or making such coin, he cannot give in evidence his declarations to an artificer, at the time he employed him to make such instrument, as to the purposes for which he wished it to be made.

(z) *Com. v. Fuller*, 8 Met. 313, where the exceptions to this form were overruled.

D. R. F. then and there well knowing the same to be false and counterfeited, against, etc. (*Conclude as in book 1, chapter 3.*)

(355) *Having in custody less than ten counterfeit pieces of coin, under Rev. Sts. of Mass. ch. 127, § 16.(a)*

That A. B., on, etc., at, etc., “had in his custody and possession (at the same time) a certain piece of false and counterfeit coin, counterfeited in the likeness and similitude of the good

(a) *Com. v. Stearns*, 10 Met. 256. Dewey, J.: “The objection of variance between the proof offered and the offence charged, is not sustained. The crime charged in the indictment is the having in possession, etc., a certain counterfeit coin, in the likeness of a silver coin called a dollar. The evidence shows this coin to have been in the likeness and similitude of a Mexican dollar. But a Mexican dollar is not the less a dollar, nor is it inappropriately described as a dollar. The term ‘dollar’ does not import a coin coined at the mint of the United States. The United States statute of 1792, c. 16, legalized the dollar of the United States coinage, and the statute of 1834, c. 71, legalized the dollar of Mexico. Both are adopted by us, and both are coins current, by law and usage, in this commonwealth; and the having in possession of counterfeits of either, with the criminal intent described in the Rev. Sts. ch. 127, §§ 15, 16, constitutes the statutory offence.

“The only question in the present case, that can require much consideration, is that which arises upon the motion in arrest of judgment for supposed deficiency in the allegations in the indictment. As to the first of these reasons, viz., that the indictment is insufficient, inasmuch as the term ‘dollar,’ therein used, may denote a coin, the counterfeiting whereof is not criminal by the laws of this commonwealth, it seems to be answered by the very language of the indictment. The dollar therein set forth is alleged to be ‘in the similitude of the legal silver coin current, by law and usage, in this commonwealth.’ And this is a substantial allegation, that must be proved. Hence, no dollar that is not of the similitude of the legal silver coin of this commonwealth, will correspond with that set forth in the indictment, and furnish the proof requisite to a conviction.

“The remaining inquiry is whether the indictment is bad for uncertainty, in not specifying, with greater particularity, the descriptive character of the counterfeit dollar, as of the coinage of the Mexican government and in the similitude of a Mexican dollar. It is true that the indictment must particularly set forth the *kind* of coin alleged to be counterfeit, etc., as is stated in 2 Hale’s P. C. 187, and 2 Chit. C. L. 105, note *d*. But that rule does not affect the present question, nor present any objection to this indictment. The kind of coin to be set forth and described, is the denomination or name of the coin; as the dollar, the half dollar, or the dime, as the case may be. And if this indictment had merely described the alleged counterfeit coin to be in the likeness of silver coin current in this commonwealth, by the laws and usages thereof, it would have presented a case liable to the objection of a want of particularity of description. But such is not the case here. The coin is described under its appropriate denomination, and that is sufficient, without adding, as a further description, the place of coinage. The place of coinage of a dollar is no necessary part of the description which is required to be given of a coin in an indictment. The recital of the various inscriptions and devices borne on it, and particularly the date of its issue, would seem to be quite as material as the place of coinage; but these are not required to be specified. The court are of opinion that this objection is not sustained either by authority or sound principle.”

and legal silver coin current within said commonwealth, by the laws and usages thereof called a dollar, with intent then and there to pass the same as true; he the said A. B. then and there well knowing the same to be false and counterfeit," etc.

(356) *For uttering and publishing as true a forged promissory note.*
Rev. Sts. of Mass. ch. 127, § 2.(b)

That C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord at B. aforesaid, in the county aforesaid, had in his custody and possession a certain false, forged, and counterfeit promissory note, the said C. D. then and there knowing the same to be false, forged, and counterfeit, which false, forged, and counterfeit promissory note is of the tenor following, that is to say, etc.; and that the said C. D. did then and there feloniously utter and publish the same as true, with intent thereby then and there to injure and defraud one J. N., the said C. D. then and there knowing the said promissory note to be false, forged, and counterfeit; against, etc. (*Conclude as in book 1, chapter 3.*)

(357) *For forging a promissory note.* *Rev. Sts. of Mass. ch. 127,*
§ 1.

That C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord at B. aforesaid, in the county aforesaid, feloniously did falsely make, forge, and counterfeit a certain false, forged, and counterfeit promissory note, which false, forged, and counterfeit promissory note is of the tenor following, that is to say, etc., with intent thereby then and there to injure and defraud one J. N.; against, etc. (*Conclude as in book 1, chapter 3.*)

(358) *For counterfeiting a bank bill.* *Rev. Sts. of Mass. ch. 127,*
§ 4.

That C. D., late of, etc., on the first day of June, in the year of our Lord at B., in the county of S., feloniously did falsely make, forge, and counterfeit a certain false, forged, and counterfeit bank bill, payable to the bearer thereof, purporting

(b) This and the nine following precedents are taken from Tr. & Heard's Prec. 224-232.

to be issued by the president, directors, and company of the Merchants' Bank, then being an incorporated banking company established in this state, to wit, at B., in the county of S., and commonwealth aforesaid, which said false, forged, and counterfeit bank bill is of the tenor following, that is to say, etc., with intent thereby then and there to injure and defraud one J. N.; against, etc. (*Conclude as in book 1, chapter 3.*)

(359) *For having in possession at the same time, ten or more counterfeit bank bills, with intent to utter and pass the same as true.* *Rev. Sts. of Mass. ch. 127, § 5.*

That C. D., late of, etc., on the first day of June, at B., in the county of S., had in his possession at the same time,^(c) ten similar false, forged, and counterfeit bank bills, payable to the bearer thereof, purporting to be issued by the president, directors, and company of the Suffolk Bank, then being an incorporated banking company established in this state, to wit, at B., in the county of S., and commonwealth aforesaid, one of which said false, forged, and counterfeit bank bills is of the following tenor, that is to say^(d) (*here insert a true copy of all and each of the ten bills; after inserting a true copy of the first, go on to say, one other of which said false, forged, and counterfeit bank bills is of the following tenor, and so on with the whole of them*); the said C. D. then and there knowing each and every one of said bank bills to be false, forged, and counterfeit as aforesaid, with intent then and there to utter and pass the same as true, and thereby then and there to injure and defraud one J. N.; against, etc. (*Conclude as in book 1, chapter 3.*)

(360) *Passing a counterfeit bank bill.* *Rev. Sts. of Mass. ch. 127, § 6.*

That C. D., late of, etc., on the first day of June, in the year of our Lord at B., in the county of S., did utter and pass

(c) It is necessary to aver that the defendant had the bills in his possession *at the same time*. An averment that he had them in his possession on the same day, is not sufficient. *Edwards v. The Commonwealth*, 19 Pick. 124. And see *R. v. Williams*, 2 Leach, C. C. (4th London ed.), 529.

(d) If the defendant has retained possession of the bills, allege as follows: "Each and every one of which said false, forged, and counterfeit bank bills were then and there retained and kept by the said C. D., so that the jurors aforesaid cannot set forth the tenor thereof." *Tr. & H. Prec.*

to one E. F. a certain false, forged, and counterfeit bank bill, payable to the bearer thereof, purporting to be issued by the president, directors, and company of the Suffolk Bank, then being an incorporated banking company established in this state, to wit, at B. aforesaid, in the county aforesaid, and commonwealth aforesaid, which said false, forged, and counterfeit bank bill is of the tenor following, that is to say, etc., with intent thereby then and there to injure and defraud the said E. F., the said C. D. then and there knowing the said bank bill to be false, forged, and counterfeit, against, etc. (*Conclude as in book 1, chapter 3.*)

(361) *Having in possession a counterfeit bank bill, with intent to pass the same. Rev. Sts. of Mass. ch. 127, § 8.*

That C. D., late of, etc., on the first day of June, in the year of our Lord at B., in the county of S., had in his possession a certain false, forged, and counterfeit bill, in the similitude of the bills payable to the bearer thereof, and issued by the president, directors, and company of the Boylston Bank, then being a banking company established in this state, to wit, at B., in the county of S., and commonwealth aforesaid, which said false, forged, and counterfeit bank bill is of the tenor following, that is to say, etc., with intent then and there to utter and pass the same, the said C. D. then and there knowing the said bank bill to be false, forged, and counterfeit; against, etc. (*Conclude as in book 1, chapter 3.*)

(362) *Making a tool to be used in counterfeiting bank notes. Rev. Sts. of Mass. ch. 127, § 9.*

That C. D., late of, etc., on the first day of June, in the year of our Lord at B., in the county of S., did engrave and make a certain plate, the same being then and there an instrument and implement adapted and designed for the forging and making of false and counterfeit notes, in the similitude of the notes issued by the president, directors, and company of the Suffolk Bank, then being a banking company legally established in this state, to wit, at B., in the county of S., and commonwealth aforesaid; against, etc. (*Conclude as in book 1, chapter 3.*)

- (363) *Having in possession a tool to be used in counterfeiting bank notes with intent to use the same. Rev. Sts. of Mass. ch. 127, § 9.*

That C. D., late of, etc., on the first day of June, in the year of our Lord at C., in the county of M., feloniously had in his possession a certain engraved plate, the same being then and there an instrument adapted and designed for the forging and making false and counterfeit notes in the similitude of the notes issued by the president, directors, and company of the Merchants' Bank, then being a banking company established in this state, to wit, at B., in the county of S., and commonwealth aforesaid, with intent then and there to use the same in forging and making false and counterfeit notes in the similitude of the notes issued by the president, directors, and company of the said Merchants' Bank; against, etc. (*Conclude as in book 1, chapter 3.*)

- (364) *Counterfeiting current coin. Rev. Sts. of Mass. ch. 127, § 15.*

That C. D., late of B., in the county of S., yeoman, on the first day of June, in the year of our Lord at B. aforesaid, in the county aforesaid, did counterfeit a certain piece of silver coin, current within this state, to wit, the commonwealth aforesaid, by the laws and usages thereof, called a dollar; against, etc. (*Conclude as in book 1, chapter 3.*)

- (365) *Uttering and passing counterfeit coin. Rev. Sts. of Mass. ch. 127, § 16.*

That C. D., late of, etc., on the first day of June, in the year of our Lord at B., in the county of S., a certain piece of counterfeit coin, counterfeited in the likeness and similitude of the good and legal silver coin current within this state, to wit, the commonwealth aforesaid, by the laws and usages thereof, called a dollar, did utter and pass as true to one E. F., the said C. D. then and there^(e) well knowing the same to be false and counterfeit; against, etc. (*Conclude as in book 1, chapter 3.*)

(e) An indictment which charged the defendant with uttering a counterfeit half crown to M. A. W., "knowing the same to be false and counterfeit," omitting the words "then and there," was held sufficient. *R. v. Page*, 2 Moody, C. C. 219.

(366) *Coining, etc., under the North Carolina statute.*(f)

That the defendant, on, etc., with force and arms, in the county aforesaid, one pair of dies, upon which then and there were made and impressed the likeness, similitude, figure, and resemblance of the sides of a lawful Spanish milled dollar, without any lawful authority, then and there feloniously had in his possession, etc., for the purpose of then and there making and counterfeiting money, in the likeness and similitude of Spanish milled silver dollars, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(f) *State v. Haddock*, 2 Hawks, 462. Taylor, C. J.: "It does not admit of any reasonable doubt, that a pair of dies is an instrument or instruments, within the 4th sect. of the act of 1811, c. 814, upon which the first count is framed; and being more generally used in coinage than any other instrument, is one upon which the act would be most likely to operate frequently. It may be said, that as the dies are described as having impressed upon them only the likeness, similitude, figure, and resemblance of the sides of a Spanish milled dollar, and not the edges, they cannot answer the purpose described in the act, of making a counterfeit similitude or likeness of a Spanish milled dollar. But it is for the jury to consider whether the dies be calculated to impress the counterfeit similitude or likeness of a dollar; for these words in the act extend the offence beyond an exact imitation of the figures and marks of the coin. For if the instrument, in point of fact, will impose on the world, in general it is sufficient whether the imitation be exact or not. And this is the construction, upon those highly penal acts, relative to the coin, in England. Thus, having knowingly in possession a puncheon for the purpose of coining, is within the stat. of 8 & 9 Wm. III., though that alone, without the counter puncheon, will not make the figure; and though such puncheon had not the letters, yet it was held sufficiently described in the indictment as a puncheon which would impress the resemblance of the head side of a shilling. 1 East, P. C. 171. But if the parts of this indictment which are employed in a description of the dies were altogether omitted, the charge would be within the act, for it would then read, that the defendants had in their possession a pair of dies, for the purpose of making counterfeit dollars, which is the crime in substance created by the act. As I do not perceive any ground for any other objection arising from the record, the case having been submitted without argument, my opinion is, that the reasons in arrest be overruled." And in this opinion the rest of the court concurred.

CHAPTER II.

BURGLARY.

- (367) General frame of indictment for burglary and larceny, at common law.
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- (374) Burglary and larceny, and assault with intent to murder.
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 - (379*a*) Under Iowa statute.
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 - (379*d*) Under Mass. statute.
- (380) Burglary and larceny. Breaking and entering a meeting-house, and stealing a communion cup and chalice, under Ohio statute.
- (381) Burglary. Breaking and entering a storehouse with intent to steal, under Ohio statute.
- (382) Burglary. Breaking and entering a shop with intent to steal, under Ohio statute.
- (383) Burglary. Breaking and entering a dwelling-house with intent to steal, under Ohio statute.
- (384) Breaking and entering a mansion-house in the daytime, and attempting to commit personal violence, under Ohio statute.
- (385) Breaking and entering a mansion-house in the night season, and committing personal violence, under Ohio statute.
- (386) Against a person for attempting to break and enter a dwelling-house at night, at common law.

(387) Breaking a storehouse with intent to enter and steal, at common law.

(388) Being found by night armed, with intent to break into a dwelling-house, and commit a felony therein.

(367) *General frame of indictment for burglary and larceny, at common law.*(a)

That A. B., late of, etc., in, etc., laborer, on, etc., about the hour of one of the night,(b) of the same day, with force and arms, at the parish(c) aforesaid, in the county aforesaid, the dwelling-house(d) of one S. D.(e) there situate,(f) feloniously and burglariously(g) did break and enter,(h) with intent(i) the

(a) This form is taken from Stark. C. P. 435.

(b) It was once thought necessary to allege a particular hour (State v. G. S., 1 Tyler, 295), and to state it to be in the night of the preceding day, though after twelve o'clock. If the *noctanter* be omitted in the common form averring larceny, the indictment will be turned into one for larceny. Thompson v. Com., 4 Leigh, 652. It is certainly bad to aver the offence to have been committed "between the hours of twelve at night and nine in the next morning" (State v. Mather, Chip. 32), though the day and hour themselves are not material to be proved as laid. See 2 East P. C. 515; Lewis v. State, 16 Conn. 32; Com. v. McLaughlin, 11 Cush. 598; Com. v. Marks, 4 Leigh, 658. But the better opinion now is that it is enough to aver the offence to have been in the night. Wh. Cr. Pl. & Pr. § 130; Wh. Cr. L. 8th ed. § 817. "About the hour of twelve is sufficient." State v. Seymour, 36 Me. 225; Methard v. State, 19 Oh. St. 363.

(c) The place should be correctly stated.

(d) See on this point Wh. Cr. L. 8th ed. § 815. The house must be described as the dwelling-house of the real tenant (Stark. C. P. 79); and this is the proper description, though part only of the house be separately occupied. The particular interest of the alleged owner is immaterial. It is enough if the house be his. People v. Van Blaricum, 2 Johns. 105. Whether burglary may be committed in a church or chapel, see Wh. Cr. L. 8th ed. § 782. If the offence be committed in an out-house within the curtilage, it should be laid to have been committed in the dwelling-house or in a stable, etc., being part of the dwelling-house. Dobb's case, East, P. C. 513; Garland's case, Ib. 493; McElrath v. State, 55 Ga. 562. "Mansion-house is an equivalent." Com. v. Pennock, 3 S. & R. 133. The ownership may be averred to be in the occupant. Wh. Cr. L. 8th ed. § 816. An unoccupied house may be averred to be the dwelling-house of the owner. Com. v. Reynolds, 122 Mass. 454.

(e) Under the Ohio statute it should be alleged or implied that some one resided in the house. Forsyth v. State, 6 Ham. 22. The ownership should be correctly averred. Stark. C. P. 215; Wh. Cr. L. 8th ed. § 815. Even the first names of the owners must be proved as laid. Doan v. State, 26 Ind. 495.

(f) These words are essential (Lewis's C. L. 139; Hale's P. C. (by Stokes & Ing.) 549; Wh. Cr. L. 8th ed.); and so are the words "dwelling-house" and "in the night." The means of breaking and entering are immaterial.

(g) See Wh. Cr. L. 8th ed. § 114.

(h) This is necessary at common law. Wh. Cr. Pl. & Pr. § 265; 1 Hale, 549; Lyon v. People, 68 Ill. 271; Portwood v. State, 29 Tex. 47. But the term has been held in Massachusetts not necessary in statutory house-breaking. Tully v. Com., 4 Metc. 357.

(i) The averment of intent is not necessary, when there is an averment

goods and chattels of the said C. D.(j) in the said dwelling-house then and there being, then and there feloniously and burglariously to steal,(k) take, and carry away; and one gold watch of the value of thirty dollars,(l) of the goods and chattels of the said C. D.,(m) in the said dwelling-house then and there being found, then and there feloniously and burglariously did steal, take, and carry away, against, etc. (*Conclude as in book 1, chapter 3.*)

(368) *Burglary and larceny at common law. Another form.*(n)

That J. B., late, etc., on, etc., about the hour of eleven in the night of the same day, at, etc., the dwelling-house of I. H. Jr., there situate, feloniously, and burglariously did break and enter (and the goods and chattels, moneys, and property of the said I. H. Jr., in the said dwelling-house then and there being, then and there feloniously and burglariously to steal, take, and carry away), and then and there in the said dwelling-house, etc.,

that a felony was committed. On the other hand an averment of intent will sustain an indictment when there is no averment of commission of the intended felony, though in this case there can be no conviction for the latter offence, and the conviction must be for the burglary only. Wh. Cr. L. 8th ed. § 818. A statutable felony will support the indictment. 1 Hawk. c. 38, s. 38; R. v. Knight and Roffrey, East, P. C. 510.

(j) The owner of the goods need not be here stated. R. v. Clarke, 1 C. & K. 421; State v. Morrissey, 22 Iowa, 158. See Doan v. State, 26 Ind. 495, *supra*, note (e).

(k) Unless the commission of a felony be actually laid, this is essential. R. v. Lyon, Leach, 221, 3d ed.; Wh. Cr. L. 8th ed. § 818.

(l) Describe the character and value of each article according to the fact, as in larceny. See *infra*, notes to form 415.

(m) The ownership must be correctly stated if a conviction of larceny is asked. Wh. Cr. L. 8th ed. §§ 932 *et seq.*; Stark. C. P. 210, 215.

(n) Com. v. Brown, 3 Rawle, 207. Sentence was passed on this indictment in the supreme court. "The motion in arrest of judgment," said Gibson, C. J., "is founded on the absence of a direct averment that the breaking and entering was with a felonious intent, and although a larceny is charged to have been committed afterwards, it is argued, with much theoretic plausibility, that this may have been in pursuance of a design subsequently hatched. It is certain that all material facts must be positively charged instead of being collected by inferences; but in this particular this indictment is found to be in strict accordance with the most approved precedents (Cro. Cir. Comp. 203), and for that reason this motion, also, must be overruled." In Cro. C. C. 203, the passage in brackets in the text, which is plainly surplusage, is omitted. See also 3 Chit. C. L. 203. The disadvantage of this form is that in case the stealing is left unproved, the defendant must be acquitted *in toto*. 1 Leach, 708; 3 Chit. C. L. 1114. On this account Lord Hale recommends the form first given, on which the defendant may be convicted of either burglary or larceny, or both. 1 Hale P. C. (ed. Stokes & Ing.) 559.

twenty-eight yards of Scotch ingrain carpet, of dark colors, of the value of thirty- dollars, etc., of the goods and chattels, moneys, and property of the said I. H. Jr., in the said dwelling-house then and there being found, then and there feloniously and burglariously did steal, take, and carry away, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(369) *Second count. Receiving stolen goods.*

That the said J. B., afterwards, to wit, on, etc., at, etc., the goods and chattels, moneys, and property aforesaid, by some ill-disposed person to the jurors aforesaid yet unknown, then lately before feloniously and burglariously stolen, taken, and carried away, unlawfully, unjustly, and for the sake of wicked gain, did receive and have (the said J. B. then and there well knowing the goods and chattels, moneys, and property last mentioned to have been feloniously and burglariously stolen, taken, and carried away), contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)(o)

(370) *Burglary at common law with no larceny.*

That A. B., late, etc., on, etc., about the hour of eleven in the night of the same day, at, etc., the dwelling-house of one C. D., there situate, feloniously and burglariously did break and enter, with intent the goods and chattels, moneys, and property of the said C. D., in the said dwelling-house then and there being, then and there feloniously and burglariously to steal, take, and carry away, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(370a) *Entering dwelling-house with intent to commit felony under English statute.*

(*Commencement as in prior counts*)—the dwelling-house of J. N., situate, etc., feloniously did break and enter, with intent to commit a felony therein, to wit (*stating intended felony*), against, etc.(p)

(o) As to the joinder of these counts, see *supra*, note to form 2, Wh. Cr. L. 8th ed. § 819.

(p) Archbold's C. P. 19th ed. p. 440. See *R. v. Bain*, L. & C. 129.

(370b) *House-breaking under English statute.*

(*Commencement as in prior forms*)—the dwelling-house of J. N., situate in, etc., feloniously did break and enter, with intent the goods and chattels of the said J. N. in the said dwelling-house there being, feloniously to steal, take, and carry away, and one (*describe article*) of the value of of the goods and chattels of the said J. N., then in the said dwelling-house, then and there feloniously did steal, take, and carry away, against, etc.(q)

(371) *Breaking into dwelling-house, not being armed, with intent to commit larceny, under Massachusetts statute.*

That J. T., etc., on, etc., at, etc., in the night-time of said day, with intent to commit the crime of larceny, did break and enter the dwelling-house of one C. E., there situate, said J. T. not being armed, nor arming himself in said house with a dangerous weapon, nor making any assault upon any person then being lawfully therein, against, etc., and contrary, etc.(r) (*Conclude as in book 1, chapter 3.*)

(372) *General frame of indictment in New York.(s)*

That A. B., late of, etc., on, etc., with force and arms, about the hour of eleven in the night of the same day, at, etc. (*setting forth the object of the burglary*), of one C. D., there situate, feloniously and burglariously did break and enter, etc., with intent the goods and chattels of the said C. D., in the said then and there being, then and there feloniously and burglariously to steal, take, and carry away, and (*setting forth the articles taken*), of the goods, chattels, and property of the said C. D., in the

(q) Arch. C. P. 19th ed. p. 436.

(r) This indictment appears in *Tully v. Com.*, 4 Met. 357, where the only error assigned by the learned and acute counsel who conducted the defence, was that the word "burglariously" was omitted. This, the court, however, deemed unnecessary under the statute.

(s) It has been held in New York that an indictment for burglary which did not *allege* that the breaking into the dwelling-house was effected in one of the methods prescribed by the statute (2 R. S. 668, § 10; 2 Edm. St. 688), was not good as an indictment for burglary in the *first* degree. That where a defendant so indicted was convicted and sentenced as for burglary in the first degree, for over ten years, the judgment should be reversed and a new trial granted. *People v. Burt*, Albany L. J., Feb. 4, 1871; see also *People v. Van Gaasbecke*; 9 Abbott, Prac. Rep. N. S. 518.

said then and there being, then and there feloniously and burglariously did steal, take, and carry away, to the great damage of the said C. D., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(373) *Burglary by breaking out of a house.*(t)

The jurors, etc., upon their oath present, that C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord about the hour of eleven of the clock in the night of the same day, with force and arms, at B. aforesaid, in the county aforesaid, being in the dwelling-house of E. F., there situate, one watch, of the value of one hundred dollars, six tablespoons, of the value of four dollars each, and twelve teaspoons, of the value of two dollars each, of the goods and chattels of one J. N., in the same dwelling-house then and there being found, then and there feloniously did steal, take, and carry away. And that the said C. D., being so as aforesaid in the said dwelling-house, and having so committed the felony aforesaid, in manner and form aforesaid, therein afterwards, to wit, about the hour of twelve of the clock in the night of the same day, with force and arms, at B. aforesaid, in the county aforesaid, feloniously and burglariously did break out of the same dwelling-house; and the same goods and chattels then and there feloniously and burglariously did steal, take, and carry away, etc. (*Conclude as in book 1, chapter 3.*)

(374) *Burglary and larceny, and assault with intent to murder.*

The jurors, etc., upon their oath present, that C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord about the hour of ten of the clock in the night of the same day, with force and arms, at B. aforesaid, in the county aforesaid, the dwelling-house of one J. N., there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of one R. O., in the said dwelling-house then and there being, then and there feloniously and burglariously to steal, take, and carry away, and then and there in the said dwelling-house, two candlesticks, of the value of three

(t) Wilmot, Law of Burglary.

dollars each, one silver tankard, of the value of fifty dollars, and one silver pitcher, of the value of one hundred dollars, of the goods and chattels of the said R. O., in the said dwelling-house then and there being found, then and there feloniously and burglariously did steal, take, and carry away. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said C. D., then and there, in the said dwelling-house then being, upon the day and at the hour aforesaid, in and upon the said J. N., in the said dwelling-house then and there being, unlawfully, maliciously, and feloniously did make an assault, with intent the said J. N. then and there feloniously, wilfully, and of his malice aforethought, to kill and murder, etc. (*Conclude as in book 1, chapter 3.*)

(375) *Burglary, with violence.*(u)

The jurors, etc., upon their oath present, that C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord about the hour of eleven of the clock in the night of the same day, with force and arms, at B. aforesaid, in the county aforesaid, the dwelling-house of one J. N., there situate, feloniously and burglariously did break and enter, with intent to commit felony, and that the said C. D., in the said dwelling-house then being, in and upon the said J. N., in the said dwelling-house then being, then and there unlawfully, maliciously, and feloniously did make an assault, and the said J. N., in and upon the right thigh of the said J. N., then and there unlawfully, maliciously, and feloniously did stab, cut, and wound,(v) with intent to do unto the said J. N., some grievous bodily harm,(w) etc. (*Conclude as in book 1, chapter 3.*)

(376) *Burglary and rape.*(x)

The jurors, etc., upon their oath present, that John Bell, late of B., in the county of S., laborer, on the first day of June, in

(u) Wilmot, Law of Burglary.

(v) It is not necessary to state the instrument or means by which the injury was inflicted. *Rex v. Briggs*, 1 Moody, C. C. 318.

(w) "The intent is here inserted," says Wilmot (Law of Burglary, p. 240, note (a),) "in order that if the burglary should fail, the prisoner might still be found guilty of felony, under the fourth section of 7 Wm. IV. and 1 Vict. ch. 85."

(x) On this count, if the evidence of actual rape should fail, but the jury should be satisfied of the intent, the defendant could be convicted of burglary.

the year of our Lord about the hour of twelve of the clock in the night of the same day, with force and arms, at B. aforesaid, in the county aforesaid, the dwelling-house of one Edward Styles, there situate, feloniously and burglariously did break and enter, with intent to commit felony, and then and there upon one Lucy Styles, the wife of the said Edward Styles, violently and feloniously did make an assault, and the said Lucy Styles then and there violently, and against her will, feloniously did ravish and carnally know, etc. (*Conclude as in book 1, chapter 3.*)

(377) *Burglary with intent to ravish: with a count for burglary with violence, under st. 7 Wm. IV. and 1 Vict. ch. 86, s. 2.(y)*

The jurors, etc., upon their oath present, that John Clarke, late of B., in the county of S., laborer, on the eighth day of May, in the year of our Lord about the hour of twelve in the night of the same day, with force and arms, at B. aforesaid, in the county aforesaid, the dwelling-house of one James Thompson, there situate, feloniously and burglariously did break and enter, with intent one Hannah Thompson, the wife of the said James Thompson, violently, and against her will, feloniously to ravish and carnally know, contrary to the form of the statute in such case made and provided, and against the peace, etc.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said John Clarke, on the day and year aforesaid, at B. aforesaid, in the county aforesaid, having so burglariously as aforesaid broken and entered the said dwelling-house of the said James Thompson, then and there upon the said Hannah Thompson, in the said dwelling-house then and there being, wilfully, unlawfully, and maliciously did make an assault, and the said Hannah Thompson then and there did strike and beat, contrary to the form of the statute in such case made and provided, and against the peace, etc.

(378) *Burglary and larceny, at common law, by breaking into a parish church.(z)*

The jurors, etc., on their oath present, that Michael Wilson, late of B., in the county of S., laborer, on the first day of June,

(y) Wilmot, Law of Burglary.

(z) Wilmot, Law of Burglary.

in the year of our Lord about the hour of one of the clock in the night of the same day, with force and arms, at B. aforesaid, in the county aforesaid, a certain church there situate, that is to say, the parish church of B. aforesaid, feloniously and burglariously did break and enter, and one pair of candlesticks, of the value of twenty dollars, and one communion dish, of the value of fifty dollars, of the goods and chattels of Henry Jackson and others, being parishioners of B. as aforesaid, in the said church then and there being found, then and there feloniously and burglariously did steal, take, and carry away, against the peace, etc.

(379) *Burglary and larceny. Breaking and entering a store and stealing goods, under Ohio statute.*

That A. B., on the eleventh day of October, in the year of our Lord one thousand eight hundred and fifty, in the night season, to wit, about the hour of eleven in the night of the same day, in the county of Logan aforesaid, into the storehouse there situate of William S. Keller, Jacob Keller, Joshua M. Keller, and Joseph A. Keller, partners, trading under the name and firm of "William S. Keller & Brothers," wilfully, maliciously, forcibly, feloniously, and burglariously did break and enter, with intent then and there the goods, chattels, and valuable property of the said William S. Keller, Jacob Keller, Joshua M. Keller, Joseph A. Keller, partners as aforesaid, under the name and firm of "William S. Keller & Brothers," in the said storehouse then and there being, then and there feloniously, wilfully, and burglariously to steal, take, and carry away; and then and there, in the said storehouse, three yards of cassinette, of the value of three dollars, of the goods and chattels of the said William S. Keller, Jacob Keller, Joshua M. Keller, and Joseph A. Keller, partners as aforesaid, under the name and firm of "William S. Keller & Brothers," in said storehouse then and there being found, then and there feloniously and burglariously did steal, take, and carry away. (*Conclude as in book 1, chapter 3.*)(a)

(a) Warren's C. L. 122.

(379a) *Burglary and larceny under Iowa statute.*

That J. H., etc., on or about etc., at or about the hour of one o'clock in the night of the same day, with force and arms, in the county aforesaid, one store building of B. there situated, wherein valuable merchandise was kept for sale and store, viz., pocket-knives, razors, and revolvers, of the value of one hundred dollars, feloniously and burglariously did break and enter into, with felonious intent, the goods and chattels of the said B., in said store then and there being found, then and there feloniously and burglariously to steal, take, and carry away, and seven dozen of pocket-knives, three razors, and two revolvers, of the goods and chattels of the said B., and of the value of seventy dollars, in the said store building, then and there feloniously and burglariously did steal, take, and carry away, contrary, etc.(b) (*Conclude as in book 1, chapter 3.*)

(379b) *Breaking and entering storehouse in Indiana.*

That H. T. E., late of said county, on, etc., at, etc., did then and there unlawfully and feloniously, in the night-time, burglariously break and enter into the storehouse of H. F., there situate, with intent then and there one thousand cigars, of the value of twenty-five dollars, the personal property, goods, and chattels of H. F., then and there being, then and there feloniously and burglariously to steal, take, and carry away, contrary to the statute in such cases made and provided, etc.(c) (*Conclude as in book 1, chapter 3.*)

(379c) *Shop breaking under English statute.*

(*Commencement as in prior counts*)—the shop of J. N. situate in, etc., feloniously did break and enter, with intent the goods and chattels of the said J. N., in the said shop there being, feloniously to steal, take, and carry away, and twenty yards of muslin, of the goods and chattels of the said J. N., of the value of
then in the said shop, then and there feloniously did steal, take, and carry away, against, etc.(d)

(b) This was sustained in *State v. Hayden*, 45 Iowa, 11.(c) Approved in *Edwards v. State*, 62 Ind. 34.(d) Arch. C. P. 19th ed. p. 437. See *R. v. Andrews*, C. & M. 121.

(379d) *Breaking into shop and stealing under Massachusetts statute.*

That A. R. P., etc., on, etc., and in the night time of the said day, at, etc., the building of one G. H. N., J. M. N., and G. H. L., situated in, etc., the said building being then and there occupied by said G. H. N. [other names] as a shop, feloniously and burglariously did break and enter, with intent then and there in said building, feloniously and burglariously to commit the crime of larceny, against the peace, etc.

And the jurors aforesaid, upon their oath aforesaid, do further present, that said A. R. P., on, etc., at, etc., six dozen sheep roans, of the value of five dollars each dozen, and five hundred and sixty pairs of soles, of the value of ten cents each pair, of the goods and chattels of the said G. H. N. [other names], and then and there in the possession of said G. H. N. [other names] being found in the building of said G. H. N. [other names], in, etc., then and there feloniously did steal, take, and carry away, in the building aforesaid, against, etc.

And the jurors aforesaid, upon their oath aforesaid, do further present, that W. R. G., and B. F. D., afterwards, on, etc., at, etc., the goods and chattels aforesaid, so as aforesaid, feloniously stolen, taken, and carried away, feloniously did receive and have, and did then and there aid in the concealment of the same, the said G. and D. each, then and there well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away, against the peace, etc.(e)

(380) *Burglary and larceny. Breaking and entering a meeting-house, and stealing a communion cup and chalice, under Ohio statute.*

That A. B., on the sixth day of August, in the year of our Lord one thousand eight hundred and fifty-two, at about the hour of eleven in the night season of the same day, at the township of in the county of Cuyahoga aforesaid, a certain meeting-house there situate and being, called the Saint John's Cathedral, wilfully, maliciously, forcibly, and burglariously did

(e) It was held, on this indictment, no misjoinder to charge one person with breaking and entering a building and stealing therein, and another person with receiving the goods stolen. *Com. v. Darling*, 129 Mass. 113.

break and enter into, with intent the goods, chattels, and property of M. N., of great value, in said meeting-house then and there being, feloniously and burglariously to steal, take, and carry away; and then and there, in the said meeting-house, one chalice, of the value of sixty dollars, and one communion cup, of the value of sixty dollars, of the personal goods and chattels and property of said M. N., in the said meeting-house then and there being found, feloniously and burglariously did steal, take, and carry away. (*Conclude as in book 1, chapter 3.*)(f)

(381) *Burglary. Breaking and entering a storehouse with intent to steal, under Ohio statute.*

That A. B., on the ninth day of February, in the year of our Lord one thousand eight hundred and fifty-four, in the night season of the same day, to wit, about the hour of one at night, in the county of Hamilton aforesaid, into a certain storehouse of one Isaac Smith, there situate and being, did wilfully, maliciously, burglariously, and forcibly break and enter, with intent then and there and thereby feloniously and burglariously to steal, take, and carry away the personal goods, chattels, and property of the said Isaac Smith in the said storehouse then and there being. (*Conclude, etc.*)(g)

(382) *Burglary. Breaking and entering a shop with intent to steal, under Ohio statute.*

That A. B. and C. D., otherwise called E. F., on the twenty-eight day of January, in the year of our Lord one thousand eight hundred and fifty-two, in the night season of the same day, to wit, about the hour of one at night, at the county of Hamilton aforesaid, into a certain shop of Joseph Shipley and Hawes Reed, there situate and being, did wilfully, maliciously, burglariously, and forcibly break and enter, with intent then and there and thereby feloniously and burglariously to steal, take, and carry away the personal goods and chattels and property of the said Joseph Shipley and Hawes Reed, in said shop then and there being. (*Conclude, etc.*)(h)

(f) Warren's C. L. 123
(h) Warren's C. L. 120.

(g) Warren's C. L. 120.

(383) *Burglary. Breaking and entering a dwelling-house with intent to steal, under Ohio statute.*

That A. B., on the twenty-first day of May, in the year of our Lord one thousand eight hundred and fifty-five, in the night season of the same day, to wit, about the hour of one at night, in the county of Hamilton aforesaid, into a certain dwelling-house of John M. Davidson, there situate and being, did wilfully, maliciously, burglariously, and forcibly break and enter into, with intent then and there and thereby the personal goods, chattels, property, and moneys of the said John M. Davidson, in the said dwelling-house then and there being, feloniously, and burglariously to steal, take, and carry away. (Conclude as in book 1, chapter 3.)(i)

(384) *Breaking and entering a mansion-house in the daytime, and attempting to commit personal violence, under Ohio statute.*

That A. B., otherwise called C. D., on the first day of November, in the year of our Lord one thousand eight hundred and forty-six, to wit, in the daytime of said day, in the county of Hamilton aforesaid, a certain mansion-house of one M. N., there situate, in which said mansion-house she the said M. N., then and there did reside and dwell, did unlawfully and forcibly break open and enter, and then and there in and upon the said M. N., in said mansion-house then and there being, unlawfully and forcibly did make an assault, and her, the said M. N., then and there unlawfully did threaten in a menacing manner, and so the said A. B. then and there, in manner aforesaid, in and upon the said M. N., unlawfully did attempt to commit personal violence and abuse. (Conclude as in book 1, chapter 3.)(j)

(385) *Breaking and entering a mansion-house in the night season, and committing personal violence, under Ohio statute.*

That A. B., on the third day of September, in the year of our Lord one thousand eight hundred and forty-three, about the hour of nine, in the night season of the same day, in the county of Montgomery aforesaid, a certain mansion-house there

(i) Warren's C. L. 120.

(j) Warren's C. L. 131.

situate, in which said mansion-house one M. N. did then and there reside and dwell, unlawfully and forcibly did break open and enter, and in and upon the said M. N., then and there in said mansion being and residing, then and there unlawfully and forcibly did make an assault, and her the said M. N. did then and there strike, beat, and otherwise ill-treat, and in and upon the said M. N. did then and there unlawfully commit personal violence and abuse. (*Conclude as in book 1, chapter 3.*)(*k*)

(386) *Against a person for attempting to break and enter a dwelling-house at night, at common law.*(*l*)

That J. O'B., late of, etc., on, etc., at, etc., the dwelling-house of W. H., there situate, about the hour of twelve in the night-time of the same day, unlawfully and wickedly did attempt and endeavor to break and enter, with an intent the goods and chattels of the said W., in the same dwelling-house then and there being, feloniously and burglariously to steal, take, and carry away, to the evil example of all others in the like case offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(387) *Breaking a storehouse with intent to enter and steal, at common law.*(*m*)

That T. H., late of, etc., on, etc., about the hour of twelve in the night-time of the same day, at, etc., the storehouse of C. B., there situate, unlawfully and wickedly did break, with an intent the same storehouse to enter, and the goods and chattels of the said C. B., in the same storehouse then and there being, then and there feloniously to steal, take, and carry away, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(388) *Being found by night armed, with intent to break into a dwelling-house and commit a felony therein.*

That C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord about the hour of eleven of the night of the same day, at B. aforesaid, in the county aforesaid, was found in the night-time as aforesaid, then

(*k*) Warren's C. L. 131.

(*l*) Drawn in 1787, by Mr. Bradford, then attorney-general of Pennsylvania.

(*m*) *Ib.*

and there being armed with a dangerous weapon, to wit, a gun, with intent then and there, in the night-time as aforesaid, to break and enter the dwelling-house of one E. F., there situate, and then and there, in the night-time as aforesaid, in the said dwelling-house, feloniously to steal, take, and carry away the goods and chattels and personal property of the said E. F., in the said dwelling-house then and there being, against the peace, etc. (*Conclude as in book 1, chapter 3.*)

ARSON.

CHAPTER III.

ARSON.(a)

- (389) General frame of an indictment for arson at common law.
- (390) Burning unfinished dwelling-house, under Mass. Rev. Sts. ch. 126, § 5.
- (391) Setting fire to a building, whereby a dwelling-house was burnt in the night-time. Mass. Stat. 1852, ch. 259, § 3.
- (392) Burning a dwelling-house in the daytime. Rev. Sts. of Mass. ch. 126, § 2.
- (393) Setting fire to a building adjoining a dwelling-house in the daytime, whereby a dwelling-house was burnt in the daytime. Rev. Sts. of Mass. ch. 126, § 2.
- (394) Burning a stable within the curtilage of a dwelling-house. Rev. Sts. of Mass. ch. 126, § 3.
- (395) Burning a city hall in the night-time. Rev. Sts. of Mass. ch. 126, § 3.
- (396) Burning a meeting-house in the daytime. Rev. Sts. of Mass. ch. 126, § 4.
- (397) Burning a vessel lying within the body of the county. Rev. Sts. of Mass. ch. 125, § 5.
- (398) Burning a dwelling-house with intent to injure an insurance company. Rev. Sts. of Mass. ch. 126, § 8.
- (399) Setting fire to stacks of hay. Rev. Sts. of Mass. ch. 126, § 6.
- (400) Burning a dwelling-house in the night-time. Mass. Stat. 1852, ch. 259, § 3.
- (401) Burning a flouring mill, under Ohio statute.
- (402) Burning a dwelling-house, under Ohio statute.
- (403) Burning a boat, under Ohio statute.
- (404) Attempt to commit arson. Setting fire to a store, under Ohio statute.
- (405) Burning a stack of hay, under Ohio statute.
- (406) Burning a meeting-house, under the Vermont statute.
- (407) Burning one's own house, with intent to defraud the insurers.
- (408) Burning a barrack of hay, under Pennsylvania statute.
- (409) Burning stable, under same.

(a) See generally Wh. Cr. L. 8th ed. § 826 *et seq.*

(339) *General frame of an indictment for arson at common law.*(b)

That A. B., late, etc., a certain dwelling-house(c) of one C. D.,(d)

(b) This form, with a portion of the notes to it, is drawn from Stark. C. P. 437.

(c) "House" is enough at common law. Wh. Cr. L. 8th ed. § 840. Arson might at common law be committed, not only by burning the dwelling-house, but also the out-houses, which were parcel of the dwelling-house (Wh. Cr. L. § 1667; 1 Hale, 570; 3 Inst. 67, 69; 1 Hawk. c. 39, s. 1, 2), and it is not necessary to allege the burning of the dwelling-house, but only of the house simply. 1 Hale, 567, 570; 3 Inst. 67; 1 Hawk. c. 39, s. 1. In Glanfield's case (East, P. C. 1034), it was holden that out-houses generally was a sufficient description under 9 Geo. I. c. 22, without showing of what kind. But when "dwelling-house" or other term is specially used in the statute, it must be followed in the indictment. State v. Sutcliffe, 4 Stroth. 372; McLane v. State, 4 Ga. 335, *infra*.

(d) The allegation of ownership is material, for it must appear that the offence was committed against the property of another, and this allegation must be proved. See Wh. Cr. L. 8th ed. § 841; Wh. Cr. Pl. & Pr. § 109; Com. v. Wade, 17 Pick. 395; Carter v. State, 20 Wis. 647; Pedley's case, Leach, 277; Breeme's case, Leach, 261; Spalding's case, Leach, 251; Holmes's case, Cro. Car. 376; 3 Inst. 66. But under the present (1880) English statutes the ownership need not be stated, and if stated need not be proved. R. v. Newbould, L. R. 1 C. C. R. 344.

In the case of the Rickmans (East, P. C. 1034), the defendants were charged with the arson of a certain house, situate in the Parish of Ellingham, etc., and after conviction, all the judges held that the conviction was wrong, because the indictment did not state the ownership. It appeared in that case that the house belonged to the parish, and that they suffered one Thomas Early to live in it, but in whom the legal estate was vested was unknown; and the judges held, that it might have been laid to be the property of the overseers, or of persons unknown. Where there is a doubt in which of several persons the property vests, it should be differently described in different counts, in order to obviate any objection on the score of variance. If the occupation be merely permissive, as by a pauper, of a house belonging to the parish, the property cannot be laid in him; *vide supra*, Rickman's case; and if such pauper or mere servant burn the house which he inhabits, even exclusively, he is guilty of arson. Cowen's case, East, P. C. 1027. Otherwise, if the defendant has possession under a lease for years (Holmes's case, Cro. Car. 376; 3 Inst. 66; 1 Hale, 568; Breeme's case, Leach, 261; Pedley's case, Leach, 277), or as mortgagor. Spalding's case, Leach, 258. But it seems that if the mere reversion be in the defendant, who has not possession, he may be guilty of the offence, by burning the house. Harris's case, Fost. 113; East, P. C. 1023. In Spalding, Breeme's, and Pedley's cases, it was held, that in respect of the property against which the offence was committed, the statute 9 Geo. I. c. 22 did not alter the common law. The offence is against the possessions, and the house, etc., should be described as belonging to the person who has possession coupled with an interest; for if the occupation be merely permissive, the house ought not to be described as the occupier's. See Rickmans' and Cowen's cases, *supra*. In Glanfield's case (East, P. C. 1034), it appeared that the out-houses burnt, including the brew-house, were the property of Blanche Silk, widow, as also was the dwelling-house in which she lived with her son, J. S.; that the son also occupied the out-houses, with the exception of the brew-house, on his own account, but without any particular agreement with his mother; that she repaired the dwelling-house and out-houses, and that they jointly contributed to the ingredients for the beer, which was brewed in the brew-house, and which was used in the family. Mr. J. Heath held, that the brew-house ought to be laid as in their joint occupation, but the other out-houses

there situate, feloniously, wilfully, and maliciously^(e) did set fire to, and the same house then and there, by such firing as aforesaid, feloniously, wilfully, and maliciously did burn,^(f) against, etc. (*Conclude as in book 1, chapter 3.*)

as in the occupation of the son; and upon the indictment so drawn, the prisoner was convicted and executed.

On an indictment for setting fire to a barn in the night-time, whereby a dwelling-house was burned, charging the barn to be the property of G. and N., it appeared that G. was the general owner of the barn, and that part of it was in the occupancy of N., and a part of it used for the purposes of a stage company, who had hired it from G. by parol agreement, for no specified time, G. himself being a member and agent of the company, and exercising no different control over this part of the premises than he exercised over the other way-stations of the company. It was held, that the company, and not G., was the occupant of this part of the barn; and that the allegation of the indictment, that the property was N. and G.'s, was not supported by the proof. *Com. v. Wade*, 17 Pick. 395. See note to *infra*, 391.

"Belonging to" is a sufficient averment of ownership. *Com. v. Hamilton*, 15 Gray, 480. That any kind of ownership will sustain the averment, see *Wh. Cr. L.* 8th ed. § 841. The mere possession of a servant, however, is not such ownership. *Wh. Cr. L.* 8th ed. § 837.

A room in a large building, which room was separately leased by the owner of the building to a merchant, who occupied it as a store, and having no direct communication with the other parts of the building, is properly laid in the indictment for arson as the property of the lessee. *State v. Sandy*, 3 Iredell, 570. See *Shepherd v. People*, 19 N. Y. 537.

When there are several tenants of a building separated in distinct apartments, the burning must be averred to be of the property of the tenant of the part burned. *State v. Toole*, 29 Conn. 344; *State v. Tonnerly*, 9 Iowa, 436; *Shepherd v. People*, 19 N. Y. 537.

If a man, by negligently firing his own house, endanger others which are contiguous, he may be indicted for the misdemeanor, and it is unnecessary in such case to aver an intention to burn the contiguous houses. 1 Hale, 568; *Cro. Car.* 377; *Schofield's case*, *Cald.* 397. But if the defendant set fire to his own house with intent to defraud the insurers, and the house of his neighbor be burnt in consequence, the offence will amount to arson. Per *Grose, J.*, in giving judgment in *Probert's case*, *East, P. C.* 1030. *Wh. Cr. L.* 8th ed. § 843.

"And in Isaac's case, *East, P. C.* 1031, where the offence committed under such circumstances was laid as a misdemeanor, *Buller, J.*, directed an acquittal on the ground that the misdemeanor merged in the felony. And if the defendant set fire to his own house with intent to burn his neighbor's house, and the latter be burnt in consequence, the offence is as much arson as if the defendant had immediately set fire to his neighbor's house; therefore if A., intending to burn B.'s house, set fire to his own, and B.'s is burnt in consequence, the indictment may charge A. directly with the wilful and malicious burning of B.'s house." 1 Hale, 569; *East, P. C.* 1034.

(e) "The words maliciously and wilfully are descriptive of the offence as ousted of clergy by the statute 4 and 5 P. & M. c. 4; but they are no part of the description under the statute 9 Geo. I. c. 22; though under the latter statute to oust the offender of clergy, it must appear that the act was wilful and malicious, and it seems to be safer so to aver it. See 1 Hale, 567, 569; 3 Inst. 67; *East, P. C.* 1033, 1021, *Minton's case*." *Starkie's C. P.* 438. As to the necessity of these terms, see *Wh. Cr. L.* 8th ed. § 839, and cases there cited.

(f) "Burn" is essential. *Cochran v. State*, 6 Gill, 400; *Howell v. State*, 5 Grat. 664; *Mary v. State*, 24 Ark. 44. "Set fire to" has been held in Maine equivalent to "burn." *State v. Taylor*, 45 Me. 322.

(390) *Burning unfinished dwelling-house, under Mass. Rev. Sts. ch. 126, § 5.(g)*

That on, etc., at, etc., about the hour of twelve o'clock in the night-time of the same day, a building of one P. U., of, etc., there situate, erected by the said P. U. for a dwelling-house, and not completed or inhabited, feloniously, wilfully, and maliciously did set fire to, and the same building, so erected for a dwelling-house, then and there, by the setting and kindling of such fire, did unlawfully, wilfully, and maliciously burn and consume, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)(h)

(g) *Com. v. Squire*, 1 Met. 258. This was objected to, because there was no averment that the building alleged to have been burnt was other than that mentioned in Rev. Stat. ch. 126, § 5. The court held, however, that this was not necessary, and further, that there was no insensibility in "a building erected" being unfinished. The word "feloniously," which was part of the indictment, but which is omitted in the text, was rejected as surplusage.

(h) *Com. v. Squire*, 1 Met. 258. Under this indictment the court said: "The only remaining question to be considered is, whether the offence is so charged in this indictment, that after a conviction or acquittal thereon it will protect the defendant against a second indictment for the same act, supposing the facts would have warranted originally an indictment for the offence of the higher degree, embraced in the third section. The difficulty here supposed also arises from not stating in the indictment the exception contained in the fifth section. It does not seem to us, that the security of the party against being again charged for the same act, necessarily requires the form of the indictment to be such as is suggested by the defendant's counsel. Upon this point, also, some aid may be derived from considering the course of proceeding in prosecutions for larcenies. Larcenies, by our statute, are of various grades, and are punished with greater or less severity, according to the aggravation of the offence; and these different grades of offence are punished under the provisions contained in different and distinct sections of the statute. But we know very well that in larcenies indictments are often found, charging the inferior grade of crimes, and omitting the circumstances of aggravation, when all the facts existing in the case would, if disclosed to the jury, bring the case within the higher grade of larcenies. Would it be a defence to such indictment, on the trial before the petit jury, that the defendant had committed the offence charged, but with certain aggravating circumstances not charged? It seems to us not; and that when the offence charged in the indictment, and the offence actually committed, are both merely larcenies, the greater offence includes the less, and evidence proving the greater offence will support an indictment for the smaller offence. Such being the case, it would seem necessarily to follow, that the conviction or acquittal of a party thus charged with the minor larceny must be a bar to a subsequent indictment charging the same larceny with aggravating circumstances. The same rule would seem properly to apply to the different gradations of offences, of maliciously burning buildings, as provided for in the third and fifth sections of the Rev. Stat. ch. 126, which is also the same statute in which there are created four distinct grades of larcenies, with different punishments annexed to them. The offences made punishable by the third and fifth sections are both only misdemeanors, and the same courts have jurisdiction of each. There would be but one criminal act in

(391) *For setting fire to a building, whereby a dwelling-house was burnt in the night-time. Mass. Stat. 1852, ch. 259, § 3.*

That C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord in the night-time of said day, with force and arms, at B. aforesaid, in the county aforesaid, a certain building, to wit, a barn, of one E. F.,(i) there situate, feloniously, wilfully, and maliciously did set fire to, and by the kindling of said fire, and by the burning of said building, the dwelling-house of the said E. F., their situate, was then and there in the night-time of said day, feloniously, wilfully, and maliciously burnt and consumed; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.(j)

(392) *For burning a dwelling-house in the daytime. Rev. Sts. of Mass. ch. 126, § 2.(k)*

That C. D., late of B., in the county of S., laborer, on the first

the malicious burning of a building, whether that building alone was consumed, or it occasioned the burning of any building described in the third section. Taking the case under those limitations, we think if the government proceed by an indictment for the smaller offence, and on trial thereof there be a judgment of conviction or acquittal, such judgment would be a legal bar to a second indictment charging the same offence with aggravation. *State v. Cooper*, 1 Green, 362. Upon the whole matter we are therefore brought to the conclusion, that this indictment does set forth the burning of such a building as is described in the statute; that as the facts stated in the indictment constitute a misdemeanor and not a felony, the offence is well charged in the indictment as a misdemeanor; and if the word feloniously be rejected as surplusage, as we think it may be, that the indictment is sufficiently particular in its form of charging the offence to be punished; and finally, that a conviction or acquittal on this indictment would be a good bar to a second indictment for the same act, alleging it with the aggravating circumstances described in the third section of the statute. The result, therefore is, that the motion in arrest of judgment must be overruled, and the punishment awarded against the defendant which is prescribed by law in such cases."

(i) In the case of *Com. v. Wade* (17 Pick. 395, 1835), which was an indictment under stat. 1804, ch. 131, it was queried whether it was necessary to allege who was the owner or occupant of such building, or whether it was the building of *another*. But if the allegation is made, being descriptive of the offence, it must be strictly proved. Two indictments charging the defendant with setting fire to a barn, whereby a dwelling-house was burnt in the night, one alleging it to be the barn of A. and B., the other alleging it to be the barn of A. and C., were held not to be for the same offence. *Com. v. Wade*, 17 Pick. 395; Tr. & H. Prec. 33.

(j) Tr. & H. Prec. 33.

(k) If the fire was set to a building adjoining the dwelling-house, the allegations in indictments upon this section will be conformable to the facts in the case, and set forth as in the preceding precedent. Tr. & H. Prec. 33.

day of June, in the year of our Lord in the daytime of said day, with force and arms, at B. aforesaid, in the county aforesaid, the dwelling-house of one E. F., there situate, feloniously, wilfully, and maliciously did burn and consume; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.(l)

(393) *For setting fire to a building adjoining a dwelling-house in the daytime, whereby a dwelling-house was burnt in the daytime.*
Rev. Sts. of Mass. ch. 126, § 2.

That C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord in the daytime of said day, with force and arms, at B. aforesaid, in the county aforesaid, a certain building, to wit, a wood-house, of one A. B., there situate, and adjoining to the dwelling-house of the said A. B., there situate, feloniously, wilfully, and maliciously did set fire to; and by the kindling of said fire and the burning of said building, the said dwelling-house of the said A. B. was then and there, in the daytime, feloniously, wilfully, and maliciously burnt and consumed; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.(m)

(394) *For burning a stable within the curtilage of a dwelling-house.*
Rev. Sts. of Mass. ch. 126, § 3.(n)

That C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord in the night-time of said day, with force and arms, at B. aforesaid, in the county aforesaid, feloniously, wilfully, and maliciously did set fire to a certain stable of one A. B., there situate, and then and there being within the curtilage of the dwelling-house of the said A. B. there situate, and by the kindling of such fire, the aforesaid stable there situate, and then and there being within the curtilage of said dwelling-house as aforesaid, was then and there, in the night-time, wilfully, and maliciously burnt and consumed;

(l) Tr. & H. Prec. 34.

(m) Tr. & H. Prec. 34.

(n) This form may be adopted for the malicious burning, in the night-time, of any other building mentioned in the latter part of the third section of the statute, describing the building in the identical words of the statute. Tr. & H. Prec. 34.

against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.(o)

(395) *For burning a city hall in the night-time. Rev. Sts. of Mass. ch. 126, § 3.*

That C. D., late of W., in the county of W., yeoman, on the first day of June, in the year of our Lord in the night-time of said day, with force and arms, at W., in the county of W., the city hall of the city of W., in the county of W. aforesaid, there situate and erected for public use, to wit, the transaction of the municipal business of said city of W., then and there, in the night-time of said day, feloniously, wilfully, and maliciously did burn and consume; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.(p)

(396) *For burning a meeting-house in the daytime. Rev. Sts. of Mass. ch. 126, § 4.*

That C. D., late of F., in the county of M., laborer, on the first day of June, in the year of our Lord in the daytime of said day, with force and arms, at F. aforesaid, in the county aforesaid, a certain meeting-house, there situate, of the property of the First Baptist Society in Framingham, in said county, and erected for public use, to wit, for the public worship of God,(q) then and there, in the daytime, feloniously, wilfully, and maliciously did burn and consume; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.(r)

(397) *For burning a vessel lying within the body of the county. Rev. Sts. of Mass. ch. 125, § 5.*

That C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord in the night-time of said day, with force and arms, at B. aforesaid, in the county aforesaid, a certain vessel, called the "Rattler," the property of

(o) Tr. & H. Prec. 34.

(p) Tr. & H. Prec. 34.

(q) If any other building erected for public use, as town-houses, court-houses, academies, etc., the public use for which it is designed must be set forth. Tr. & H. Prec. 35.

(r) Tr. & H. Prec. 35.

one A. B. and of E. F., G. H., etc., then and there lying and being at B., within the body of the said county of S., feloniously, wilfully, and maliciously did burn and consume; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.

(398) *For burning a dwelling-house with intent to injure an insurance company. Rev. Sts. of Mass. ch. 126, § 8.*

That C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord with force and arms, at B., in the county of S., feloniously, wilfully, and maliciously did burn and consume a certain dwelling-house, there situate, of the property of one J. N.,^(r¹) which dwelling-house aforesaid was then, to wit, at the time of committing the felony aforesaid, insured against loss and damage by fire by the Massachusetts Mutual Fire Insurance Company, the same then and there being an insurance company legally established, with intent thereby then and there to injure said insurance company; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.^(s)

(399) *For setting fire to stacks of hay. Rev. Sts. of Mass. ch. 126, § 6.*

That C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord at B. aforesaid, in the county aforesaid, feloniously,^(t) wilfully, and maliciously did burn and consume a certain stack of hay, of the property of one J. N., then and there being; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.^(u)

(r¹) This need not be stated. *R. v. Newboulst*, L. R. 1 C. C. R. 349.

(s) *Tr. & H. Prec.* 37.

(t) The offence of burning stacks of hay, as provided against by Mass. Stat. 1804, §§ 3, 4, was not a felony. *Com. v. Macomber*, 3 Mass. 254. It was made a felony by Stat. 1852, ch. 37, i. In Maryland the offence is not a felony, either by common law or by the acts of 1809 and 1845. *Black v. The State*, 2 Maryland, 376; *Tr. & H. Prec.* 37.

(u) *Tr. & H. Prec.* 37.

(400) *For burning a dwelling-house in the night-time. Mass. Stat. 1852, ch. 259, § 3.*

The jurors for the commonwealth of Massachusetts, upon their oath present, that C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord in the night-time of said day, with force and arms, at B. aforesaid, in the county aforesaid, the dwelling-house of one A. B., there situate, feloniously, wilfully, and maliciously did burn and consume; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.^(v)

(401) *Arson. Burning a flouring mill, under Ohio statute.*

That A. B., on the twentieth day of January, in the year of our Lord one thousand eight hundred and forty-three, in the county of Cuyahoga aforesaid, wilfully, maliciously, and feloniously did burn and cause to be burned, by setting fire thereto, a certain mill there situate, to wit, a flouring mill, the property of one M. N., and of the value of three thousand dollars,^(w) contrary, etc.

(402) *Arson. Burning a dwelling-house, under Ohio statute.*

That A. B., on the first day of April, in the year of our Lord one thousand eight hundred and fifty-two, in the county of Hamilton aforesaid, did wilfully, maliciously, and feloniously set fire to and burn one dwelling-house, then and there being, the property of one M. N., of the value of fifty dollars and more,^(x) contrary, etc.

(403) *Arson. Burning a boat, under Ohio statute.*

That A. B. and C. D., on the thirteenth day of May, in the year of our Lord one thousand eight hundred and fifty-three, in the county of Hamilton aforesaid, did wilfully, maliciously, and feloniously set fire to and burn one boat, then and there being, of the property of John Patton, of the value of fifty dollars and more,^(y) contrary, etc.

(v) Tr. & H. Proc. 32.

(x) Warren's C. L. 137.

(w) Warren's C. L. 139.

(y) Warren's C. L. 137.

(404) *Attempt to commit arson. Setting fire to a store, under Ohio statute.*

That A. B. and C. D., on the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and forty-six, in the county of Logan aforesaid, the storehouse of one M N., of the value of fifty dollars, there situate, feloniously, wilfully, unlawfully, and maliciously did set fire to, with intent then and there the said storehouse feloniously, unlawfully, wilfully, and maliciously to burn and destroy,(z) contrary, etc.

(405) *Burning a stack of hay, under Ohio statute.*

That A. B. and C. D., on the nineteenth day of October, in the year of our Lord one thousand eight hundred and fifty-one, in the county of Cuyahoga aforesaid, unlawfully, wilfully, and maliciously did set fire to, and thereby did then and there burn and destroy a certain stack of hay, of the value of twenty dollars, the property of M. N., there situate and being.(a)

(406) *Burning a meeting-house, under the Vermont statute.(b)*

That J. R., of, etc., on, etc., at, etc., a certain meeting-house, then and there situated, belonging to the First Calvinistic Congregational Society in Burlington aforesaid, erected for public use, to wit, for the public worship of Almighty God, did then and there wilfully, maliciously, and feloniously set

(z) Warren's C. L. 140 ; Ohio v. Davis, 15 Ohio, 272.

(a) Warren's C. L. 140.

(b) State v. Roe, 12 Vt. 93. Collamer, J. : "The indictment charged that the church or meeting-house belonged to 'the First Calvinistic Congregational Society in Burlington.' The proof of this allegation consisted in the paper presented, and parol proof, that, from 1810, the society has been known by the name of the First Calvinistic Congregational Society in the town of Burlington; and that they built, and have never occupied the house. Was this sufficient? The existence of a society or corporation, *de facto*, is sufficient, and that is always shown by parol. Even had it been shown that, in point of fact, the society never were organized and never were a corporation, it was of no importance. The burning of the meeting-house would be arson within our statute, though it did not belong to a corporation.

"But, it is said, there is a variance in the name. They take no name in the writing. They might have many names by reputation, and they are not, in the indictment, attempted to be described by name, but by general character or tenet; and the words, as to location, in the town of Burlington, and in Burlington, are in substance the same. This whole allegation and its materiality, will come again under consideration on the motion in arrest."

fire to and burn, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(407) *For burning one's own house, with intent to defraud the insurers.(c)*

That A. B., etc., on, etc., at, etc., feloniously, wilfully, maliciously, and unlawfully did set fire to a certain house, being in the possession of him the said A. B., with intent thereby to injure and defraud the (*here state the corporation defrauded*) (then and there being a body corporate), against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(408) *Burning a barrack of hay, under Pennsylvania statute.(d)*

That H. C., late, etc., on, etc., at, etc., feloniously, unlawfully, wilfully, and maliciously did set fire to a certain barrack of hay of A. B., there situate, with intent to destroy the same, to the great damage of the said A. B., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(409) *Burning a stable, under same.*

That the said H. C., at the county aforesaid, on the day and year aforesaid, and within the jurisdiction of this court, with

(c) This form was prepared under the English statute. That the offence is not indictable at common law, see Wh. Cr. L. 8th ed. §§ 830, 843.

(d) This form, with the necessary alterations, is based on *Chapman v. Com.*, 5 Whart. 427. *Per Curiam*: "The word 'maliciously' in the first count, may pass as an equivalent for the word 'wilfully'; but the words 'barrack, rick, or stack of hay, grain, or bark,' as much import a barrack of hay or grain, as they do a rick or stack of hay or grain. They were used elliptically in the context, to avoid repetition. The statute is an amplification of the act of 1767, under a mitigated punishment; and it is to be remarked that it was not indictable in that act, though it is so now, to burn a barn, 'unless it had hay or corn therein.' It is not credible, therefore, that the legislature did not formerly extend as much protection to a barn as they subsequently intended to extend to a barrack, which, in Pennsylvania, is an erection of upright posts supporting a sliding roof, usually of thatch; for of all the buildings on a farm, it is the cheapest, and that which, independently of the property housed by it, offers the least incitement to malicious mischief. It is not generally, if at all, used by the tanner to cover his bark; but containing the material, its contents would be within the words of the statute, and the protection intended to be given by it.

"The second count is for feloniously burning a stable, which is undoubtedly a subject of the statutory offence, independent of its contents; but as it does not conclude against the form of the statute, and there is no such felony in the common law, there is no count in the indictment on which the judgment can be rested." The form in the text is modified to meet the opinion of the court.

force and arms, feloniously, unlawfully, wilfully, and maliciously did set fire to and burn a certain stable of the aforesaid A. B., there situate, with intent to destroy the same, to the evil example of all others in like case offending, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

CHAPTER IV.

ROBBERY.(a)

(410) General frame of indictment at common law.

(410a) Robbery in New Hampshire of U. S. national currency.

(411) Robbery, the prisoner being armed with a dangerous weapon. Mass. Rev. Sts. ch. 125, § 13.

(412) Robbery, the prisoner being armed with a dangerous weapon, and striking and wounding the person robbed. Rev. Sts. of Mass. ch. 125, § 13.

(413) Robbery, not being armed. Rev. Sts. of Mass. ch. 125, § 15.

(414) Attempting to extort money by threatening to accuse another of a crime. Rev. Sts. of Mass. ch. 125, § 17.

(410) *General frame of indictment at common law.*(b)

That A. B., etc., in the highway there, in and upon E. F. there being,(c) feloniously(d) did make an assault, and him the said E. F. in bodily fear(e) and danger of his life, in the highway aforesaid, then and there feloniously did put, and one gold watch,

(a) See Wh. Cr. L. 8th ed. §§ 847 *et seq.*

(b) For this form, see Stark. C. P. 441.

(c) "Near the highway" has been sustained as a substitute for "in the highway." *State v. Anthony*, 7 Ired. 234; *State v. Wilson*, 67 N. C. 456. But the allegation "in" is not sustained by proof of "near." *State v. Cowan*, 7 Ired. 239.

(d) It is essential to aver that the assault was feloniously made. Stark. C. P. 99. See Wh. Cr. L. 8th ed. § 857.

(e) It is necessary to aver, that the property was taken with violence from the person, and against the will of the party. *Fost.* 128; 1 *Hale*, 534; *Leach*, 229. "The allegation that the party was put in fear is of modern introduction; and in *Donally's case* (*Leach*, 229), it was observed by the judges, that no technical description was necessary, provided it appeared on the whole that the offence had been committed with violence, and against the will of the party. And in *Smith's case* (*East*, P. C. 783), the prisoner was charged with assaulting the prosecutor with force and arms, and putting him in corporal fear, and taking a sum of money from his person, against his will; it was objected that the taking ought to have been alleged to have been done violently, but all the judges agreed, that a robbery was sufficiently described, and that *Lord Hale* (1 *Hale*, 534) was inaccurate in his expression." Stark. C. P. 442. See Wh. Cr. L. 8th ed. §§ 847 *et seq.* "Against his will" is not necessary in California. *People v. Shaler*, 28 Cal. 490.

of the value of (insert goods taken, as in larceny), of the goods and chattels of the said E. F., from the person and against the will(f) of the said E. F., in the highway aforesaid, then and there feloniously, and violently and forcibly,(g) did seize, take, and carry away (with intent from the person of the said E. F. the said goods and chattels of the said E. F. to rob and steal),(h) against, etc. (Conclude as in book 1, chapter 3.)

(410a) *Robbery of U. S. national currency.*

That J. G. and W. M., both of, etc., on, etc., at, etc., with force and arms, in and upon one S. L., of, etc., feloniously did make an assault, and him the said S. L. in bodily fear and danger of his life then and there feloniously did put, and two bank bills for the payment of two dollars each, and of the value of two dollars each, of the national currency of the United States, and two United States treasury notes of the value of two dollars each, of the goods, chattels, and moneys of him, the said S. L., from the person and against the will of him the said S. L., then and there feloniously and by violence and putting in fear did steal, take, and carry away, contrary, etc.(i) (Conclude as in book 1, chapter 3.)

(411) *Robbery, the prisoner being armed with a dangerous weapon.*
Mass. Rev. Sts. ch. 125, § 13.(j)

That C. D., late of, etc., on the first day of June, in the year of our Lord with force and arms, at B. aforesaid, in the county aforesaid, in and upon one J. N. feloniously did make an assault, and the said J. N. in bodily fear and danger of his life then and there feloniously did put, and one gold watch, of the value of two hundred dollars,(k) of the goods and chattels of the said J. N., from the person and against the will of the said J. N., then and there feloniously, and by force and violence, did rob,

(f) This is necessary. Wh. Cr. Pl. & Pr. § 267; Wh. Cr. L. 8th ed. § 857.

(g) As to importance of these allegations, see *Collins v. People*, 39 Ill. 233; *Anderson v. State*, 28 Ind. 22.

(h) This is necessary in Ohio. *Matthews v. State*, 4 Ohio St. 538.

(i) The above indictment was sustained in *State v. Gorham*, 55 N. H. 152.

(j) Tr. & H. Prec. 461; Com. v. Martin, 17 Mass. 359.

(k) The same rule as to description of property prevails as in larceny. See *infra*, form 415. If the larceny be well pleaded, the defendant may be convicted of it in case the charge of burglary fails. Wh. Cr. L. 8th ed. § 858.

steal, take, and carry away, the said C. D. being then and there armed with a dangerous weapon, to wit, a pistol, with intent, if then and there resisted by the said J. N., him, the said J. N., then and there to kill; against, etc. (*Conclude as in book 1, chapter 3.*)

(412) *Robbery, the prisoner being armed with a dangerous weapon, and striking and wounding the person robbed. On the latter clause of the thirteenth section of the Rev. Sts. of Mass. ch. 125, § 13.(l)*

That A. B., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord with force and arms, at B. aforesaid, in the county aforesaid, in and upon one J. N., feloniously did make an assault, and the said J. N. in bodily fear and danger of his life, then and there, feloniously did put, and sundry pieces of silver coin, current within this commonwealth by the laws and usages thereof, amounting together to the sum of twelve dollars, and of the value of twelve dollars, of the moneys and property of the said J. N., from the person and against the will of the said J. N., then and there feloniously and by force and violence did rob, steal, take, and carry away; and that the said A. B. was then and there armed with a certain dangerous weapon, to wit, a pistol, and being then and there so armed as aforesaid, the said A. B., with the dangerous weapon aforesaid, the said J. N., in and upon the face and head of the said J. N., then and there feloniously did strike and wound; against, etc., and contrary, etc.

(413) *Robbery, not being armed. Rev. Sts. of Mass. ch. 125, § 15.(m)*

That C. D., late of, etc., laborer, on the first day of June, in the year of our Lord with force and arms, at B. aforesaid, in the county aforesaid, in and upon one J. N. feloniously did make an assault, and the said J. N. then and there feloniously did put in fear, and one gold watch, of the value of one hundred dollars, of the goods and chattels of the said J. N., from the person and against the will of the said J. N., then and there

(l) Tr. & H. Prec. 462.

(m) Tr. & H. Prec. 463, where reference is made to Com. v. Humphries, 7 Mass. 242; Com. v. Clifford, 8 Cushing, 215, 217.

feloniously, and by force and violence, did rob, steal, take, and carry away; against, etc., and contrary, etc.

(414) *Attempting to extort money by threatening to accuse another of a crime. Rev. Sts. of Mass. ch. 125, § 17.(n)*

That C. D., late of, etc., on the first day of June, in the year of our Lord with force and arms, at B. aforesaid, in the county aforesaid, unlawfully and maliciously did threaten one J. N., in a certain conversation with the said C. D. then and there had of and concerning the said J. N., to accuse the said J. N. of having (*here describe the accusation*), with the intent by so doing thereby then and there to extort from the said J. N. a certain sum of money, to wit, the sum of five hundred dollars; against, etc., and contrary, etc.

(n) Tr. & H. Prec. 463. (For other cases of this class, see *infra*, 972 *et seq.*)

LARCENY.

CHAPTER V.

LARCENY.(a)

- (415) General frame of indictment at common law.
- (416) Stealing the property of different persons.
- (417) Larceny at a navy yard of the United States.
- (418) Larceny on the high seas.
- (419) Larceny on the high seas. Another form.
- (420) Larceny in an American ship at the Bahama Islands.
- (421) Second count. Receiving, etc.
- (422) Larceny. Form in use in New York.
- (422a) Same in Maine.
- (423) Same in Pennsylvania.
- (424) Second count. Receiving stolen goods.
- (425) Same in New Jersey.
- (426) Same in South Carolina.
- (427) Same in Michigan.
- (427a) Same in Indiana.
- (427b) Bank note in Massachusetts.
- (428) Bank note in North Carolina.
- (429) Bank note in Pennsylvania.
- (430) Bank note in Connecticut.
- (431) Bank note in Tennessee.
- (431a) Bank note in Iowa.
- (431b) Stealing notes of unknown banks.
- (432) Larceny in dwelling-house in daytime. Mass. Rev. Sts. ch. 126, § 14.
- (432a) Larceny in building in Massachusetts.
- (433) Breaking and entering a vessel in the night-time, and committing a larceny therein, under Mass. Rev. Sts. ch. 126, § 11.
- (434) Breaking and entering a shop in the night, and committing a larceny therein, under Mass. Rev. Sts. ch. 126, § 11.
- (435) Larceny by the cashier of a bank. Mass. Stat. 1846, ch. 171, § 1.
- (436) Breaking and entering a stable in the night-time, and committing a larceny therein. Mass. Stat. 1851, ch. 156, § 1.
- (437) Breaking and entering a shop in the night-time, adjoining to a dwelling-house, with intent to commit the crime of larceny, and actually stealing therein. Mass. Stat. 1839, ch. 31.

(a) For this offence generally, see Wh. Cr. L. 8th ed. § 862 *et seq.*

- (438) Entering a dwelling-house in the night-time without breaking, some persons being therein, and being put in fear. Mass. Rev. Sts. ch. 126, § 12.
- (439) Breaking and entering a dwelling-house in the daytime, the owner being therein, and being put in fear. Mass. Rev. Sts. ch. 126, § 12.
- (440) Breaking and entering a city hall, and stealing therein in the night-time. Mass. Rev. Sts. ch. 126, § 14.
- (441) Stealing in a building that is on fire. Mass. Rev. Sts. ch. 126.
- (442) Larceny from the person. Rev. Sts. of Mass. ch. 126, § 16.
- (443) Larceny of real property. Mass. Stat. 1851, ch. 151.
- (443a) Stealing and receiving goods from ware-house under Mass. statute.
- (444) Larceny and embezzlement of public property, on the statute of the United States of the 30th April, 1790, § 26.
- (445) Stealing, destroying, or concealing wills under English statute.
- (445a) Stealing documents of title under English statute.
- (445b) Stealing valuable securities under English statute.
- (445c) Stealing lead, etc., under English statute.
- (445d) Stealing or cutting bills under English statute. (See *infra*, 483.)

(415) *General frame of indictment at common law.*

That A. B., at, etc., on, etc., (b) one hat, (c) of the value of one dollar, (d) of the goods and chattels of C. D., (e) then and there being found, feloniously did steal, take, and carry away. (f) (*Conclude as in book 1, chapter 3.*)

(b) As to name, time, and place, see notes to form 2, *supra*, pp. 9 *et seq.*

(c) *Pleading of articles stolen—Documents—In statutory larcenies* it is ordinarily sufficient to give the statutory designation, and it is enough if this is sufficiently accurate to identify the document. See *Bonnell v. State*, 64 Ind. 498. But if the pleader undertakes to give the words of the document, then a variance as to such words is at common law fatal. See cases cited Wh. Cr. Pl. & Pr. §§ 182 *et seq.* *R. v. Craven*, R. & R. 14; *U. S. v. Keen*, 1 McLean, 429; *U. S. v. Lancaster*, 2 McLean, 431. In an indictment for falsely pretending a paper to be a valid promissory note, it is sufficient to designate it, setting it forth not being necessary. *R. v. Coulson*, T. & M. 332; 1 Den. C. C. 592; 4 Cox C. C. 332; *Com. v. Coe*, 115 Mass. 481. “Purporting to be” is not a necessary qualification of the designation. *R. v. Birch*, 1 Leach, 79; 2 W. Bl. 790; *State v. Gardiner*, 1 Ired. 27; Wh. Cr. L. 8th ed. § 738.

United States Courts.—Money, and bank notes, and coin, are “personal goods,” within the meaning of the sixteenth section of the crimes act of 1790, c. 36, respecting stealing and purloining on the high seas. *U. S. v. Moulton*, 5 Mason, 537.

An order on the cashier of the Bank of the United States is evidence in support of an indictment for forging an order on the cashier of the corporation of the Bank of the United States. *U. S. v. Hinman*, 1 Baldw. 292. It is not necessary to give a particular description of a letter charged to have been secreted and embezzled by a postmaster, nor to describe the bank notes, particularly, inclosed in the letter. But if either the letter or the notes be described in the indictment, they must be proved as laid. *U. S. v. Lancaster*, 2 McLean, 431. It is enough to show that the letter came into the hands of the postmaster, in the

words of the statute, without showing where it was mailed, and on what route it was conveyed. (*Ibid.*)

Massachusetts.—An indictment under the act of March 15, 1785, for larceny, alleging that the defendant stole "a bank note of the value of —, of the goods and chattels of —," is sufficient, without a more particular description of the note. *Com. v. Richards*, 1 Mass. 337. "Divers bank bills, amounting in the whole to —, etc., and of the value of, etc., of the goods and chattels," etc., has been held sufficient. *Larned v. Com.*, 12 Met. 240; *Com. v. Sawtelle*, 11 Cush. 142. And so of "certain moneys, to wit, divers promissory notes, current as money in said commonwealth." *Com. v. Ashton*, 125 Mass. 384. See, for other cases, *infra*, pp. 383 *et seq.*; form 427*b*.

"Sundry bank bills and sundry promissory notes issued by the United States, commonly called legal tender notes, all said bills and notes together amounting to ninety dollars, and of the value of ninety dollars," is not an adequate description of United States treasury notes. *Com. v. Cahill*, 12 Allen, 540. See *Hamblett v. State*, 18 N. H. 384; *infra*, p. 384.

"For the payment of money," need not be averred of a promissory note. *Com. v. Brettun*, 100 Mass. 206.

Connecticut.—Where an information for theft described the property alleged to be stolen as "thirteen bills against the Hartford Bank, each for the payment and of the value of ten dollars, issued by such bank, being an incorporated bank, in this state," it was held that this description was sufficiently certain. *Salisbury v. State*, 6 Conn. 101.

New York.—A contract not under seal is incorrectly described as a bond, and the error is fatal. *People v. Wiley*, 3 Hill, 194.

Where the indictment stated that the defendant stole "four promissory notes, commonly called bank notes, given for the sum of fifty dollars each, by the Mechanics' Bank in the city of New York, which were due and unpaid, of the value of two hundred dollars, the goods and chattels of P. C., then and there found," etc., it was held a sufficient description, without saying they were the property of P. C. The word "chattels" denotes property and ownership. *People v. Holbrook*, 13 Johns. 90.

Under the New York statute, which makes the stealing of "personal property" larceny, an indictment for grand larceny, in stealing bank notes, alleged that the defendant feloniously stole, took, and carried away ten promissory notes, called bank notes, issued by the Chicopee Bank for the payment of divers sums of money, amounting in the whole to the sum of fifty dollars, and of the value of fifty dollars; ten promissory notes, called bank notes, issued by the Agawam Bank, etc., of the goods, chattels, and property of B. M. It was held, on motion in arrest of judgment, that the indictment was sufficient. It was held, also, that it was of no consequence whether the banks were organized within the bounds and under the laws of New York, or were banks of other states or countries, so far as the allegations in the indictment were concerned; the name of the banks being mentioned by way of description of the property stolen. *People v. Jackson*, 8 Barb. 637. See *infra*, p. 383.

In an indictment for stealing bank notes, it is sufficient to describe them, in the same manner as other things which have an intrinsic value, by any description applicable to them as chattels. (*Ibid.*)

Pennsylvania.—Under the act of 15th April, 1790, an indictment for stealing bank notes must lay them as promissory notes for the payment of money (*Com. v. Boyer*, 1 Binn. 201); and, therefore, an indictment for stealing a "ten dollar note of the president, directors, and company of the Bank of the United States," is bad. But "one promissory note," etc., is now under the criminal code sufficiently descriptive. *Com. v. Henry*, 2 Brewster, 566; *Com. v. Byerly*, *Ibid.* 568.

An indictment charging that the defendant feloniously did steal and carry away "sundry promissory notes for the payment of money, of the value of eighty dollars, of the goods and chattels of the said A. M.," was held under the act of 1810 too vague and uncertain; the notes, it was said, should be more particularly

described, and it should be set forth that the money was unpaid on them; *Stewart v. Com.*, 4 S. & R. 194; though in a subsequent case it was held that where there was enough in the description of the note to show it was unpaid, an averment to that effect is unnecessary. *Com. v. M'Laughlin*, 4 Rawle, 464. Though see *Rev. Act of 1860*, hereafter cited. *Com. v. Byerly*, 2 Brewster, 568.

An indictment for stealing three promissory notes for the payment of money, commonly called bank notes, "on the Bank of the United States," was, in another case, held to be good. *M'Laughlin v. Com.*, 4 Rawle, 464. It is not necessary to state that the bank was duly incorporated. (*Ibid.*)

By the revised act of 1860, pamph. 435, it is sufficient if the document be averred by the name by which it is generally known.

New Jersey.—"Bank notes," pleaded as such, are not "goods and chattels" under the statute. *State v. Calvin*, 2 Zab. 207.

Maryland.—In an indictment founded upon the act of 1809, c. 138, for stealing a bank note, it is sufficient to describe the note as a bank note for the payment of, etc., and of the value of, etc. Nothing more is required than to charge the offence in the language of the act. *State v. Carsel*, 2 Har. & G. 407.

North Carolina.—In an indictment for stealing a bank note, a description of the note in the following words, "one twenty dollar bank note on the State Bank of North Carolina, of the value of twenty dollars," is good. *State v. Rout*, 3 Hawks, 618; *infra*, form 428.

An indictment charged the defendant with feloniously stealing, etc., "a certain bank note, issued by the Bank of Newbern." The note offered in evidence upon the trial purported to be issued by "the president and directors of the Bank of Newbern," whereupon the defendant was acquitted, because the evidence did not support the charge. He was then indicted for feloniously stealing, etc., a certain note "issued by the president and directors of the Bank of Newbern." To this indictment he pleaded "former acquittal," and in support of the plea produced the record of the first indictment and the proceedings thereon. It was held that the record produced did not support the plea, and the plea was overruled. *State v. Williamson*, 3 Murph. 216; *infra*, form 428.

"One promissory note issued by the treasury department of the United States for one dollar" is a sufficient description. *State v. Fulford*, 1 Phill. (N. C.) L. 563; *infra*, p. 384.

Alabama.—In an indictment charging the larceny of promissory notes omission to charge the value of the notes is a material defect. *Wilson v. State*, 1 Port. 118; and see *Sallie v. State*, 39 Ala. 691.

Mississippi.—The statute of this State makes obligations, bonds, bills obligatory, or bills of exchange, promissory notes for the payment of money, or notes for the payment of any specific property, lottery tickets, bills of credit, subjects of robbery and larceny. *Damewood v. State*, 1 How. Miss. 262; *Greeson v. State*, 5 How. Miss. 33. It is not sufficient that the indictment describes a bank note as a promissory note for the payment of money purporting to be a bank note. *Damewood v. State*, 1 How. Miss. 262. See *infra*, p. 383.

National notes are not correctly described as "\$150 in United States currency." *Merrill v. State*, 45 Miss. 651. See more fully as to national notes, *infra*, p. 384.

Missouri.—It is not necessary to allege that the bank is chartered. *McDonald v. State*, 8 Mo. 283.

Tennessee.—The place of payment in a bank note charged to have been stolen need not be stated as descriptive of the note in the indictment; but if it is stated, it then becomes material as descriptive of the offence charged, and the note produced in evidence must correspond with the description given in the indictment, or it will be a fatal variance. *Hite v. State*, 9 Yerger, 357.

Ohio.—An indictment for stealing bank bills is not sustained by proof that the prisoner stole the orders of the Ohio Railroad Company. *Grummond v. State*, Wilcox, 510. Indictments for having in possession counterfeit blank bank notes must specifically describe them. *M'Millan v. State*, 5 Ohio, 269.

Designation.—The pleader, in selecting a designation for a document which is the subject of adjudication, must keep in mind the following definitions:—

“*Receipt.*”—“Settled, Sam Hughes,” at the foot of a bill of parcels, was held to support an allegation of a receipt, without any explanatory averment. *R. v. Martin*, 1 Moody C. C. 483; 7 C. & P. 549; *R. v. Boardman*, 2 Moody & R. 147; *R. v. Rogers*, 9 C. & P. 41. Anything that admits payment, and is signed, is enough to bring the instrument within the term “receipt.” *Testick’s case*, 2 East P. C. 925; *R. v. Houseman*, 8 C. & P. 180; *R. v. Moody, Leigh & Cave*, 173: but see, under peculiar Massachusetts statute, *Com. v. Lawless*, 101 Mass. 32. But the term “receipt” is not applicable if the fact of payment either does not appear on the document or is not averred. *R. v. Goldstein, R. & R. C. C.* 473; *R. v. Harvey, R. R.* 227; *R. v. West*, 2 C. & K. 496; 1 Den. C. C. 258; *R. v. Pries*, 6 Cox C. C. 165; *Clark v. State*, 8 Ohio St. (N. S.) 630; *State v. Humphreys*, 10 Humph. 442; Wh. Cr. L. 8th ed. § 740. Nor can it be applied when the name of the receptor is wanting, or is obscure and is not helped out by averments. *R. v. Hunter*, 2 Leach, C. C. 624; 2 East P. C. 977; *R. v. Boardman*, 2 Mood. & R. 147; Wh. Cr. L. 8th ed. § 740. And such explanatory matter must not only be averred but proved. See Wh. Cr. Pl. & Pr. §§ 192–3; Wh. Cr. L. 8th ed. §§ 728 *et seq.*, 740.

“*Acquittance*” is a term used in some statutes as cumulative with receipt, and all receipts may be regarded as acquittances. *R. v. Atkinson*, 2 Moody, 215. But all acquittances are not receipts, as an acquittance may consist in an instrument simply discharging another from a particular duty. *Com. v. Ladd*, 15 Mass. 526.

A certificate by a society that a member has paid up all his dues, and is honorably discharged, is, under the English statute, neither an acquittance nor a receipt. *R. v. French*, L. R. 1 C. C. R. 217. Nor is a scrip certificate in a railway company. *Clark v. Newsam*, 1 Exch. 131; *R. v. West*, 1 Den. C. C. 258; 2 Cox C. C. 437.

“*Bill of Exchange.*”—If the drawer’s, payee’s, or drawee’s name be wanting or be unintelligible; if there be any conditions of payment; if the amount be uncertain, or if it be not expressed in money, the document will not sustain the technical description. *R. v. Curry*, 2 Moody, 218; *R. v. Birkett, R. & R.* 251; *R. v. Smith*, 2 Mood. 295; *R. v. Wicks, R. & R.* 149; *R. v. Hart*, 6 C. & P. 106; *R. v. Butterwick*, 2 Mood. & R. 196; *R. v. Randall, R. & R.* 195; *R. v. Bartlett*, 2 Moody & R. 362; *R. v. Mopsey*, 11 Cox C. C. 143; *People v. Howell*, 4 Johns. 296. See Wh. Cr. L. 8th ed. §§ 739 *et seq.* Whether drawee’s name can be dispensed with, if place of payment be given, see *R. v. Smith, supra*; *R. v. Snelling, Dears.* 219; 22 Eng. L. & E. 597. Where there is an obscurity in the “acceptance” (*R. v. Cooke*, 8 C. & P. 582; *R. v. Rogers*, 8 C. & P. 629), or the indorsement (*R. v. Arscott*, 6 C. & P. 408); as where the document was made payable to — or order (*R. v. Randall, R. & R.* 195); there is a variance. That a bill drawn by a person in his own favor, and by him accepted and indorsed, is a “bill of exchange,” is asserted in Massachusetts (*Com. v. Butterick*, 100 Mass. 12), though in England the inclination of authority is the other way. *R. v. Smith, supra*. It is not necessary, in New York, to aver that there was money due on the bill. *Phelps v. People*, 13 N. Y. Supreme Ct. 401; S. C., 72 N. Y. 334, 372.

“*Promissory Note.*” has been held to include bank notes, where the statute does not specifically cover “bank notes.” *Com. v. Paulus*, 11 Gray, 305; *Com. v. Ashton*, 125 Mass. 384; *People v. Jackson*, 8 Barb. 637; *Com. v. Boyer*, 1 Binn. 201; *Hobbs v. State*, 9 Mo. 855; though see *Culp v. State*, 1 Porter, 33. It seems to be otherwise when the statute does not use the term as a *nomen generalissimum*. *Spangler v. Com.*, 3 Binn. 533; *Damewood v. State*, 1 How. Miss. 262. Nor is it necessary, in prosecutions for larceny, that the note be locally negotiable. *Story on Bills*, § 60; *Sibley v. Phelps*, 6 Cush. 172; *People v. Bradley*, 4 Park. C. R. 245. A note which is not negotiable in one country may be negotiable in another. Wh. Conf. of L. § 447. A mere due-bill will sup-

port the designation. *People v. Finch*, 5 Johns. 237. It was at one time ruled in Pennsylvania, that if a note be not averred or implied to be still due and unpaid, it is not a promissory note. *Com. v. M'Laughlin*, 4 Rawle, 464; *Stewart v. Com.*, 4 S. & R. 194. This, however, is in Pennsylvania by statute no longer necessary; *supra*, p. 382. In any view it is enough if, on the face of the paper when it is set out, it appears still outstanding. *Ibid.*; *Com. v. Richards*, 1 Mass. 337; *Phelps v. People*, 72 N. Y. 334; *State v. Rout*, 3 Hawks, 618. See *Com. v. Brettun*, 100 Mass. 206. And though a document signed by M. and payable to his order is not a promissory note until indorsed, an allegation that D., in forging the indorsement, forged the indorsement of a promissory note, may be sustained. *Com. v. Dallinger*, 118 Mass. 439.

"*Bank Note.*"—In England, in an indictment under the 2 Geo. 2, c. 25, the document stolen must be expressly averred to be a bank note, or a bill of exchange, or some other of the securities specified. *Craven's case*, 2 East P. C. 601. See *Com. v. Richards*, 1 Mass. 337; *Larned v. Com.*, 12 Met. 240; *Com. v. Sawtelle*, 11 Cush. 142; *People v. Holbrook*, 13 Johns. 10; *State v. William*, 3 Murphey, 216, and other cases cited Wh. Cr. Ev. § 116a. A note of the bank of England is sufficiently described as a bank note of the governor and company of the Bank of England, for the payment of one pound, etc., the property of the prosecutor; the said sum of one pound thereby secured, then being due and unsatisfied to the proprietor. *Starkie's C. P.* 217. In Massachusetts, a bank note is sufficiently described as a "bank bill" in an indictment on Rev. Sts. c. 126, § 17, for stealing it. *Eastman v. Com.*, 4 Gray, 416; *Com. v. Stebbins*, 8 Gray, 493. "Bank note" and "bank bill" are synonymous. *State v. Hays*, 21 Ind. 176. And an indictment charging the larceny of "sundry bank bills of some banks respectively, to the jurors unknown, of the value of," etc., is good. *Com. v. Grimes*, 10 Gray, 470. See *State v. Hoppe*, 39 Iowa, 468; *supra*, p. 381.

An unnecessarily minute description of a bank note may be fatal; as where an indictment for stealing a bank note alleged it to be "signed for the governor and company of the Bank of England, by J. Booth," and no evidence of Booth's signature was given, the judges held the prisoner entitled to an acquittal. *R. v. Craven, Russ. & Ry.* 14; Wh. Cr. Ev. § 116.

"Bank bill or note" refers exclusively to bank paper, and does not include an ordinary promissory note. *State v. Stimson*, 4 Zab. 9. It includes, however, notes redeemed by the bank, and in its agents' hands. *Com. v. Rand*, 7 Met. 475.

Whether it is necessary to aver the bank to have been incorporated is elsewhere considered. Wh. Cr. Pl. & Pr. § 110.

Under the Maine statute it is not necessary to aver either genuineness or the name of the bank. *State v. Stevens*, 62 Me. 284.

Treasury Notes and U. S. Currency.—The following description has been held sufficient: "Two five dollar United States treasury notes, issued by the treasury department of the United States government, for the payment of five dollars each and of the value of five dollars." *State v. Thomason*, 71 N. C. 146. "One promissory note issued by the treasury department of the United States," has been also held sufficient. *State v. Fulford*, 1 Phill. N. C. L. 563; and see *Sallie v. State*, 39 Ala. 691. "Four promissory notes of the United States for the payment of money" is good (*Hummel v. State*, 17 Ohio St. 628); and so of "fifty dollars in national currency of the United States, the exact denomination of which is to the grand jury unknown" (*Dull v. Com.*, 25 Grat. 965; *Du Bois v. State*, 50 Ala. 139; *Grant v. State*, 55 Ala. 201; but see *Merrill v. State*, 45 Miss. 651; *Martinez v. State*, 41 Tex. 164; *Ridgeway v. State*, 41 Tex. 231; see Wh. Cr. Pl. & Pr. § 176); and so of "— dollars in paper currency of the United States of America." *State v. Carro*, 26 La. An. 377; *State v. Shonhausen*, 26 La. An. 421. In Massachusetts, it is held that "three bonds of the United States, each of the value of ten thousand dollars," is a good description (*Com. v. White*, 123 Mass. 430); and so of "divers promissory notes current as money in said commonwealth, of the amount and value of eighty-seven dollars,

a more particular description of which is to the jurors unknown" (Com. v. Green, 122 Mass. 333); nor is it a variance that the notes were "three tens, eleven fives, and one two," and might have been so known by the grand jury. Ibid. See Com. v. Hussey, 111 Mass. 432. "Divers promissory notes, of the amount and of the value in all of five thousand dollars, a more particular description of which is to the jurors unknown," is sufficient, and is sustained by proof of bank notes. Com. v. Butts, 124 Mass. 449. "Divers promissory notes payable to the bearer on demand, current as money in the said commonwealth, of the amount and of the value of eighty dollars, a more particular description of which is to the jurors unknown," is also good, unless it should appear that the grand jury had at the time of the finding a full description of the notes. Com. v. Gallagher, 126 Mass. 54; S. P., Com. v. Ashton, 125 Mass. 354; *supra*, p. 381; *infra*, p. 390.

An indictment on the Gen. Sts. c. 160, § 24, charging the robbery of several "promissory notes then and there of the currency current in said commonwealth," is sustained by proof that the notes stolen were either bank bills or treasury notes. The words "of the currency current in this commonwealth" are equivalent to "current as money in this commonwealth." Com. v. Griffiths, 126 Mass. 252.

But "sundry bank bills," "commonly called legal tenders," has been held insufficient. Com. v. Cahill, 12 Allen, 540. See *Hamblett v. State*, 18 N. H. 384.

"Divers United States treasury notes, and national bank notes and fractional currency notes, amounting in the whole to \$158.00, and of the value of \$158.00," is sufficient. *State v. Hurst*, 11 W. Va. 54. "Certain money and bank bills," to wit, "six dollars and eighty-five cents in bank bills, usually called United States legal tender notes, as follows: one bill of the denomination of five dollars, one bill of the value of one dollar, and eighty-five cents in currency, usually known and called postal currency," was held in New York in 1870 not to be an averment sufficiently accurate to sustain a conviction for stealing national bank notes and United States fractional currency. *People v. Jones*, 5 Lansing, 340. It was conceded that to charge the notes simply as "current bank bills of the value of —" etc., would have been enough. But it was insisted that when surplus descriptive matter, varying the character of the thing stolen, is introduced, this must be proved. *People v. Loop*, 3 Parker C. R. 559; *People v. Quinlan*, 6 Parker C. R. 9. See *Hickey v. State*, 23 Ind. 21, 334, 340; *State v. Evans*, 15 Rich. (S. C.) 31; *State v. Cason*, 20 La. An. 48; *Com. v. Butterick*, 100 Mass. 1; *McEntee v. State*, 24 Wis. 43.

"*Money*."—Under the general term "money," bank notes, promissory notes, or treasury warrants cannot be included, unless they be made a legal tender. *R. v. Major*, 2 East P. C. 118; *R. v. Hill*, R. & R. 190; *State v. Foster*, 3 McC. 442; *Williams v. State*, 12 Sm. & M. 58; *State v. Jim*, 3 Murph. 3; *McAuley v. State*, 7 Yerg. 526; *Com. v. Swinney*, 1 Va. Cas. 146; *Johnson v. State*, 11 Ohio St. 324; *Colson v. State*, 7 Black. 590; *Hale v. State*, 8 Tex. 171. In England, however, it has been held that bank notes, when a legal tender, are properly described in an indictment for larceny as "money," although at the time they were stolen they were not in circulation, but were in the hands of the bankers themselves. *R. v. West*, 7 Cox C. C. 183; *Dears. & B.* 109; *R. v. Godfrey*, *Dears. & B.* 426. Whatever is currency is money.

"*Goods and Chattels*."—Under "goods and chattels," it has been ruled that bank notes cannot be included. *Com. v. Eastman*, 2 Gray, 76; *State v. Calvin*, 2 Zab. 207; *Com. v. Swinney*, 1 Va. Cas. 146; *State v. Jim*, 3 Murph. 37; *contra*, *People v. Kent*, 1 Dougl. (Mich.) 42. As to English practice see *R. v. Mead*, 4 C. & P. 535; *R. v. Dean*, 2 Leach, 693; *R. v. Crone*, *Jebb*, 47; *Anon.*, 1 Crawf. & Dix C. C. 152. In *R. v. Mead*, halves of bank notes sent by mail were held "goods and chattels." A railway ticket has been said to be a *chattel*. *R. v. Boulton*, 1 Den. C. C. 508; 2 C. & K. 917. But see *R. v. Kilham*, L. R. 1 C. C. 264; *Steph. Dig. C. L. art.* 288, doubting. And whenever, in statutes, the terms "goods and chattels" are used as *nomen generalissimum*, and are not connected with the terms "money" or "property," they should

have this general construction. But the term, when used distinctively in a statute, has been held not to include bonds and mortgages (*R. v. Powell*, 14 Eng. Law & Eq. 575; 2 Den. C. C. 403), nor coin. *R. v. Radley*, 3 Cox C. C. 460; 2 C. & K. 977; 1 Den. C. C. 450; *R. v. Davison*, 1 Leach, 241; though see *U. S. v. Moulton*, 5 Mason, 537; *Hall v. State*, 3 Oh. St. 575. But be this as it may, it seems that in such case the words "goods and chattels" may be discharged as surplusage, and a conviction sustained without them when property is elsewhere charged. *Ibid.*; *R. v. Morris*, 1 Leach C. C. 109; *Com. v. Eastman*, 2 Gray, 76; *S. C.*, 4 Gray, 416; *Com. v. Bennett*, 118 Mass. 452. Wh. Cr. Pl. & Pr. §§ 158, 183. And the tendency is to embrace in the term all *movables*, *e. g.*, poultry and other live stock (2 East P. C. 748; *R. v. Whitney*, 1 Moody, 3); and grain in a stable (*State v. Brooks*, 4 Conn. 446). Indeed, it would seem as if whatever is subject to common law larceny should be embraced in the term unless restricted by statute. *State v. Bonwell*, 2 Harring. 529.

"Warrant, Order, or Request for Money or Goods."—"Warrant" includes any document calling for the payment of money or delivery of goods, on which, if genuine, a *primâ facie* case of recovery could be made. *R. v. Vivian*, 1 C. & K. 719; 1 Den. C. C. 35; *R. v. Dawson*, 2 Den. C. C. 75; 5 Cox C. C. 220; 1 Eng. Law & Eq. 589. A "dividend" warrant falls under this head. *R. v. Autey*, Dears. & B. 294; 7 Cox C. C. 329; and so does a letter of credit. *R. v. Raake*, 2 Moody, 66; and so, distinctively, of any letters *authorizing* but not *commanding* a particular act; and this constitutes the chief *differentia* between warrant and order. Perhaps the only cases, therefore, to which "order" does not apply, but "warrant" does, are those in which there is a discretionary power reserved to the drawee. An authority to a correspondent to advance funds if he thinks best, is a "warrant," but not an "order." See *R. v. Williams*, 2 C. & K. 51. But warrants include also (as has been seen) instruments where the drawer assumes mandatory power; *e. g.*, besides the cases just mentioned, post-office drafts (*R. v. Gilchrist*, *supra*), and bills of exchange. *R. v. Willoughby*, 2 East P. C. 581.

"Order" implies, beyond this, a mandatory power in the drawer. *R. v. Williams*, 2 C. & K. 51; *McGuire v. State*, 37 Ala. 161. A *primâ facie* case is enough; and though the drawer has neither money nor goods in the drawee's hands, and there is no privity between them, yet, as the instrument could be none the less on its face the basis of a suit, it does not, from such latent defects, lose the qualities of a forgeable order. See *R. v. Carte*, 1 C. & K. 741; *People v. Way*, 10 Cal. 336; *R. v. Lockett*, 1 Leach, 110. But a *primâ facie* drawer and drawee are necessary; and the drawer must occupy, on the face of the instrument, the attitude of "ordering," and the drawee the relation of being "ordered." See cases just cited, and *R. v. Curry*, 2 Moody, 218; *C. & M.* 652; *R. v. Cullen*, 5 C. & P. 116; *R. v. Richards*, R. & R. 193; *People v. Farrington*, 14 Johns. 348. Yet there may be cases where a drawee's name can be dispensed with. An order on the keeper of a prison, for instance, or on the sheriff of a county, is no less an order because the drawee's name is not given; and so we can conceive of an order by a factory treasurer on the factory store-keeper, to which the same remark would apply. As sustaining this may be cited, *R. v. Gilchrist*, 2 Moody, 233; *R. v. Snelling*, Dears. 219; 22 Eng. L. & Eq. 597; *Com. v. Butterick*, 100 Mass. 12; *Noakes v. People*, 25 N. Y. 380. As will presently be seen, defectiveness, when the document is set forth, may be helped out by averment. If, either on its face, or when thus explained, the document involves a call by one party on another for something valuable, it is an order. *Com. v. Fisher*, 17 Mass. 46; *Com. v. Butterick*, 100 Mass. 12; *State v. Cooper*, 5 Day, 250; *People v. Shaw*, 5 Johns. R. 236; *People v. Farrington*, 14 Johns. R. 348; *Evans v. State*, 8 Ohio St. 196; *Hoskins v. State*, 11 Ga. 92; *McGuire v. State*, 37 Ala. 361. See *Jones v. State*, 50 Ala. 161. The following was held to be an "order for the payment of money," although the party addressed was not indebted to the supposed drawer, or bound to comply: "Mr. Campbell, please give John Kepper \$10, Frank Neff." *Com. v. Kepper*,

114 Mass. 278. Even in England a note from a merchant, asking that the bearer should be permitted to test wine in the London docks, is an "order" for the delivery of goods. *R. v. Illidge*, 2 C. & K. 871; *T. & M.* 127; 3 Cox C. C. 552.

"Request" is wider still, and includes a mere invitation, and is technically proper in cases where the party supposed to draw is without authority to draw. *R. v. James*, 8 C. & P. 292; *R. v. Thomas*, 2 Moody, 16; *R. v. Newton*, 2 Moody, 59; *R. v. Walters*, C. & M. 588; *R. v. White*, 9 C. & P. 282; *R. v. Evans*, 5 C. & P. 553; *R. v. Kay*, L. R. 1 C. C. 257. It is not necessary that a drawer should be specified. *R. v. Pullbrook*, 9 C. & P. 37. Checks, drafts, and bills of exchange may be regarded as either "orders" or "requests." *R. v. Willoughby*, 2 East P. C. 944; *R. v. Shepherd*, *Ibid.*; *State v. Nevins*, 23 Vt. 519; *People v. Howell*, 4 Johns. 296. So is a post-dated check; *R. v. Taylor*, 1 C. & K. 213; but not a warrant for wages. *R. v. Mitchell*, 2 F. & F. 44. The writing need not be of a business character, nor negotiable. 2 Russ. on Crimes, 514. It is now settled in England that if the document be set out in words a misdescription will be immaterial, at least if it fall within *one* of several terms used to designate it. *R. v. Williams*, 2 Den. C. C. 61; 4 Cox C. C. 356. But simply "*W. Trim, 2s.*," is insensible and incurable. *R. v. Ellis*, 4 Cox C. C. 258.

Where there is a question whether the document is an "order," or "request," or "warrant," it is safe to give to each designation a separate count. *Wh. Cr. Pl. & Pr.* §§ 162, 195, 257.

If the writing, on its face, comes short of being either an order, warrant, request, or other statutory term, averment may be made, and evidence received, bringing it up to the required standard, as where the name of the party addressed is omitted. *R. v. Pullbrook*, 9 C. & P. 37; *R. v. Carney*, 1 Mood. 351. See *R. v. Rogers*, 9 C. & P. 41. The same rule obtains where the body of the writing is on its face insensible. *R. v. Hunter*, 2 Leach C. C. 624; *R. v. Walters*, C. & M. 588; *R. v. Atkinson*, C. & M. 325; *R. v. Cullen*, 1 Moody, 300; *R. v. Pullbrook*, 9 C. & P. 37; *Com. v. Spilman*, 124 Mass. 327; *Carberry v. State*, 11 Oh. St. 410; *State v. Crawford*, 13 La. An. 300; *Wh. Cr. L.* 8th ed. §§ 728 *et seq.* And where the fraudulent or illegal character of the document does not appear on its face, this must be helped out by averments. *Ibid.*; *Com. v. Hinds*, 101 Mass. 209; *Com. v. Costello*, 120 Mass. 359.

"*Deeds.*"—To sustain the averment of a deed, there must be a writing under seal, purporting to pass some legal right from one party to another, either mediately or immediately. *R. v. Fauntleroy*, 1 C. & P. 421; 1 Moody, 52. Nor is it necessary that a deed should rigorously pursue the statutory form. *R. v. Lyon*, R. & R. C. C. 255. *Prima facie* validity is enough.

"*Obligation.*"—When a statute uses this term as distinguished from "notes" and other documents importing obligation, it must be construed in its narrow common law sense. It is otherwise when the term is used in a statute as *nomen generalissimum*, in which case it must be construed in its most liberal sense. See *Fogg v. State*, 9 Yerg. 392.

The same distinction is applicable to the term "*undertaking.*" *R. v. West*, 1 Den. C. C. 258; 2 C. & K. 496; *S. P., Clark v. Newsam*, 1 Exch. 131.

A "*guarantee*" is an undertaking. *R. v. Joyce*, 10 Cox C. C. 100; *L. & C.* 576; *R. v. Reed*, 2 Moody, 62; and so is a bare "I. O. U." without any expressed consideration. *R. v. Chambers*, L. R. 1 C. C. 341.

"*Property*" includes whatever may be appropriated to individual use. Money falls within this definition. *People v. Williams*, 24 Mich. 156.

"*Piece of Paper.*"—A count for stealing "one piece of paper, of the value of one cent," may be good, when a count for stealing a bank note fails (*R. v. Perry*, 1 Den. C. C. 69; 1 C. & K. 727, and authorities cited in *Wh. Cr. Pl. & Pr.* § 214), in consequence of the document described being void.

Personal chattels must be described specifically by the names usually appropriated to them, and the number and value of each species or particular kind of goods stated (see 2 Hale, 182, 183; *People v. Coen*, 45 Cal. 672; *Wh. Cr. Ev.* §§ 121-6);

thus, for instance, "one coat of the value of twenty shillings; two pairs of boots, each pair of the value of thirty shillings; two pairs of shoes, each pair of the value of twelve shillings; two sheets, each of the value of thirteen shillings; of the goods and chattels of one J. S.," or "one sheep of the price of twenty shillings," etc., and the like. If the description were "twenty wethers and ewes," the indictment would be bad for uncertainty; it should state how many of each. 2 Hale, 183; Archbold's C. P. 45. Otherwise in Texas. *State v. Murphy*, 39 Tex. 46. But an indictment charging the defendant with feloniously taking three head of cattle has been held sufficiently certain under a statute, without showing the particular species of cattle taken. *People v. Littlefield*, 5 Cal. 355.

When several articles are stated, it is not necessary to separate them by the connecting word "and." *State v. Bartlett*, 55 Me. 200.

When several notes are stolen in a bunch, it is rarely that the prosecutor can designate their respective amounts and values. As a matter of necessity, therefore, an indictment charging the larceny of "sundry bank bills, of some banks respectively to the jurors unknown, of the value of \$38," etc., is sufficient. *Com. v. Grimes*, 10 Gray, 470; *Com. v. Sawtelle*, 11 Cush. 142. And there is even authority to the effect that it is enough to say "divers bank bills, amounting in the whole to, etc., and of the value of, etc., of the goods and chattels," etc. *Larned v. Com.*, 12 Met. 240; *Com. v. O'Connell*, 12 Allen, 451; *State v. Taunt*, 16 Minn. 109; *contra*, *Hamblett v. State*, 18 N. H. 384; *Low v. People*, 2 Park. C. R. 37. See *Com. v. Cahill*, 12 Allen, 540.

An indictment charging the defendant with the larceny of "six handkerchiefs" is good, though the handkerchiefs were in one piece, the pattern designating each handkerchief. 6 Term R. 267; 1 Ld. Raym. 149; Wh. Cr. Ev. § 121.

It is sufficiently certain to describe the article stolen as "one hide, of the value," etc. (*State v. Dowell*, 3 Gill & J. 310), or "one watch," etc. *Widner v. State*, 25 Ind. 234.

An indictment charging A. with stealing a printed book, of the value, etc., is correct, and the title of the book need not be stated. *State v. Dowell*, 3 Gill & J. 310; *State v. Logan*, 1 Mo. 377.

"*Lot of Lumber*," "*Parcel of Oats*," "*Mixtures*."—In Louisiana judgment was arrested on an indictment which charged the defendant with stealing a "lot of lumber," a "certain lot of furniture," and "certain tools." *State v. Edson*, 10 La. An. R. 229. On the other hand, in North Carolina, a "parcel of oats" was adjudged a sufficient description of the stolen property. *State v. Brown*, 1 Dev. 137. The reason of this distinction is, that in the first case a closer description was possible; in the second, not so. And a general description in larceny is enough. This doctrine is founded partly on the fact that the prosecutor is not considered in possession of the article stolen, and is not, therefore, enabled to give a minute description; and principally, because, notwithstanding the general description, it is made certain to the court, from the face of the indictment, that a crime has been committed, if the facts be true. *State v. Scribner*, 2 Gill & J. 246.

Substances mechanically mixed should not be described in an indictment as a "certain mixture consisting of," etc., but by the names applicable to them before such mixture, though it is otherwise with regard to substances chemically mixed. *R. v. Bond*, 1 Den. C. C. 517.

It has been held in Massachusetts that where brandy was feloniously drawn from a cask, and then bottled, it could not be described in the indictment as "bottles of brandy." *Com. v. Gavin*, 121 Mass. 54.

As to variance, see Wh. Cr. Ev. § 121.

When animals are stolen alive, it is not necessary to state them to be alive; but if when stolen the animals were dead, that fact must be stated. *R. v. Edwards*, R. & R. 497; *R. v. Holloway*, 1 C. & P. 128; *Com. v. Beaman*, 8 Gray, 497. See *R. v. Williams*, 1 Mood. C. C. 107. Wh. Cr. L. 8th ed. § 871. If an animal have the same appellation whether it be alive or dead, this appel-

lation is a sufficient description. *R. v. Puckering*, 1 Mood. C. C. 242; but see *Com. v. Beaman*, 8 Gray, 497; *Wh. Cr. Ev.* § 124; *Wh. Cr. L.* 8th ed. § 874.

Whether a description is sufficient depends in statutory cases largely on the statute. See *Wh. Cr. Pl. & Pr.* § 237. It has been held that "one sheep" is a sufficiently exact description, *State v. Pollard*, 53 Me. 124; *Wh. Cr. Ev.* § 824; and so is "a chestnut sorrel horse," *Taylor v. State*, 44 Ga. 263; and "one beef steer," *Short v. State*, 36 Tex. 644; and "one black pig, white listed, and one white pig, with a blue rump, both without ear marks, of the value of \$2.00." *Brown v. State*, 44 Ga. 300. But "a yearling" is not sufficiently specific. *Stollenwerk v. State*, 55 Ala. 142.

An indictment charging the stealing "one ham," of the value of ten shillings, of the goods and chattels of T. H., was held good, although it did not state the animal of which the ham had formed a part. *R. v. Gallears*, 2 C. & K. 981; 1 Den. C. C. 501. But an indictment for stealing "meat" is bad for generality. *State v. Morey*, 2 Wis. 494; *State v. Patrick*, 79 N. C. 656.

Specification is necessary when certain members of a class are subjects of indictment, and certain others not. Thus an indictment for stealing "three eggs" has been ruled to be bad, because only the eggs of animals *domitæ naturæ* are the subject of larceny. *R. v. Cox*, 1 C. & K. 487; 1 Den. C. C. 502, *sed quaere*. See *Wh. Cr. L.* 8th ed. § 870. But an indictment for bestiality, which described the animal as "a certain bitch," was held sufficiently certain, although the females of foxes and some other animals, as well as of dogs, are so called. *R. v. Allen*, 1 C. & K. 495. In larceny this would be bad, as the term would not indicate whether or no the animal was larcenous. *Wh. Cr. L.* 8th ed. §§ 869-871. In bestiality this distinction is immaterial.

An indictment charging the stealing of certain "gold-bearing quartz-rocks," is bad. It should appear that the rock was severed from the realty. *State v. Burt*, 64 N. C. 619; *People v. Williams*, 35 Cal. 671; *Wh. Cr. L.* 8th ed. § 865.

The prosecutor is bound by the description of the species of goods stated; but a variance in the number of the articles is immaterial when the articles are divisible, and the verdict rests upon an article within the number alleged. *R. v. Forsyth*, R. & R. 274; *Hope v. Com.*, 9 Met. 134; *Com. v. Cahill*, 12 Allen, 540; *State v. Fenn*, 41 Conn. 590. Thus if there be ten different species of goods enumerated, and the prosecutor prove a larceny of any one or more of a sufficient value, it will be sufficient, although he fail in his proof of the rest. *Com. v. Eastman*, 2 Gray, 76; *Com. v. Williams*, 2 Cush. 583; *People v. Wiley*, 3 Hill N. Y. 194. *Infra*, §§ 252, 470; *Wh. Cr. Ev.* § 145. But it was held otherwise where five certificates of stock of a particular number were alleged to be stolen, and it appeared that only one certificate of that number had been issued. *People v. Coon*, 45 Cal. 672.

Money and Coin.—Money is described as so many pieces of the current gold or silver coin of the country, called ——. The species of coin must be specified. *R. v. Fry*, R. & R. 482. See *R. v. Warshoner*, 1 Mood. C. C. 466; *People v. Ball*, 14 Cal. 100; *contra*, *U. S. v. Rigsby*, 2 Cranch C. C. R. 364. As to description in forgery see *Wh. Cr. L.* 8th ed. § 751. The subject of variance is elsewhere discussed. *Wh. Cr. Ev.* § 122.

"Twenty-five dollars in money" is not a sufficiently exact designation. *Smith v. State*, 33 Ind. 159; *Merwin v. People*, 26 Mich. 298; *Lavarre v. State*, 1 Tex. App. 685; and so substantially is *State v. Longbottoms*, 11 Humph. 39.

"Bank notes" have been already noticed.

"United States gold coin" is equivalent to "gold coin of the United States." In *McCane v. State*, 11 Ind. 195, "sixty dollars of the current gold coin of the United States" was held enough. See also *State v. Green*, 27 La. An. 598. Judicial notice will be taken of the fact that a gold coin of the denomination and value of ten dollars is an eagle. *Daily v. State*, 10 Ind. 536. See *Wh. Cr. Ev.* § 122.

Generality of description, as we have seen, may be excused by an averment

that the precise character and value of the coin or notes are unknown to the grand jury. An indictment for larceny from the person of "sundry gold coins, current as money in this commonwealth, of the aggregate value of twenty-nine dollars, but a more particular description of which the jurors cannot give, as they have no means of knowledge," and containing similar allegations as to bank bills and silver coin, is sufficiently specific to warrant a judgment upon a general verdict of guilty. *Com. v. Sawtelle*, 11 Cush. 142; *Com. v. Butts*, 124 Mass. 449; *People v. Bogart*, 36 Cal. 245. See *supra*, pp. 381, 385.

And so *a fortiori* as to an averment of "four hundred and fifty dollars in specie coin of the United States, the denomination and description of which is to the grand jury unknown." *Chisholm v. State*, 45 Ala. 66. As to allegation "unknown" see further *Wh. Cr. Ev.* §§ 97, 122; *supra*, p. 20.

But where practicable the pieces charged to be stolen should be specifically designated. *Leftwich v. Com.*, 20 Grat. 716; *People v. Ball*, 14 Cal. 101; *Murphy v. State*, 6 Ala. 845.

"Of the moneys of the said M. N." sufficiently describes ownership. *R. v. Godfrey*, D. & B. 426; *Wh. Cr. L.* 8th ed. § 979.

Where the indictment charges stealing a particular note or piece of coin, and the evidence is that such note or coin was given to the defendant to change, who refused to return the change, the defendant, even under the statutes making such conversion larceny, cannot be convicted of stealing the change; for there is a fatal variance between the description in the indictment and the proof. *R. v. Jones*, 1 Cox C. C. 105; *R. v. Wast*, D. & B. 109; 7 Cox C. C. 183; *R. v. Bird*, 12 Cox C. C. 257; and other cases cited *supra*; *Wh. Cr. Ev.* § 123. But an indictment charging the larceny of the note or coin actually given to the defendant may be good. *Com. v. Barry*, 124 Mass. 325.

(d) *Value*.—It is necessary that some specific value should be assigned to whatever articles are charged as the subjects of larceny. *Roscoe's Crim. Ev.* 512; *State v. Goodrich*, 46 N. H. 186; *State v. Fenn*, 41 Conn. 590; *People v. Payne*, 6 Johns. 103; *State v. Stimson*, 4 Zab. 9; *State v. Smart*, 4 Rich. 356; *State v. Tillery*, 1 Nott & McCord, 9; *State v. Thomas*, 2 McCord, 527; *State v. Wilson*, 1 Porter, 118; *State v. Allen*, Charlton, 518; *Merwin v. People*, 26 Mich. 298; *Morgan v. State*, 13 Fla. 671; *Sheppard v. State*, 42 Ala. 531; *supra*, § 206; *Wh. Cr. Ev.* § 126; *Wh. Cr. L.* 8th ed. § 951. An indictment cannot be sustained for stealing a thing of no intrinsic or artificial value. *State v. Bryant*, 2 Car. Law Rep. 617.

Value is only material in those cases in which an offence is graduated in conformity to the value of the thing taken. *People v. Stetson*, 4 Barb. 151; *People v. Higbee*, 66 Barb. 131; *State v. Gillespie*, 80 N. C. 396; *Lunn v. State*, 44 Tex. 85. And where the value of a thing which is the subject of the offence is necessary to fix the grade of the offence, it is a proper mode of stating it to aver that the thing is of or more than the value prescribed by the statute designating such value. *Phelps v. People*, 72 N. Y. 334.

An averment of the value of bank notes, not legal tender, is always necessary, but not so of government coins, which are values themselves. *State v. Stimson*, 4 Zab. (N. J.) 9; *Grant v. State*, 55 Ala. 201; *Wh. Cr. Pl. & Pr.* § 218. A description in an indictment in these words, "ten five-dollar bank bills of the value of five dollars each," is sufficiently definite. *Eyland v. State*, 4 Sneed, 357.

A collective or lumping valuation, so far as demurrer or arrest of judgment is concerned, is always permissible. *State v. Hood*, 51 Me. 363; *Com. v. Grimes*, 10 Gray, 470; *People v. Robles*, 34 Cal. 591. In *Com. v. O'Connell*, 12 Allen, 451, the indictment was "for a quantity of bank notes current within this commonwealth, amounting together to one hundred and fifty dollars, and of the value of one hundred and fifty dollars." It was said by the court that "it is not perceived that the description of bank bills as 'a quantity,' instead of 'divers and sundry,' constitutes an error. And the statement of the aggregate of the property stolen, where all the articles are of one kind, has been sanctioned by the court."

Com. v. Sawtelle, 11 Cush. 142. Upon such an indictment, when the articles are all of one class, the defendant may be convicted of stealing a less sum than that charged in the indictment. *Com. v. O'Connell*, 12 Allen, 451.

But when articles of different kinds, *e. g.*, "sundry bank bills, and sundry United States treasury notes," are thus lumped with a common value, the indictment cannot be sustained by proof of stealing only a part of the articles enumerated. *Wh. Cr. Ev.* § 126; *Com. v. Cahill*, 12 Allen, 540. Nor can a conviction for stealing a part of the articles charged be sustained unless to such part sufficient value is assigned or implied. *Hamblett v. State*, 18 N. H. 384; *Lord v. State*, 20 N. H. 404; *State v. Goodrich*, 46 N. H. 186; *Com. v. Smith*, 1 Mass. 245; *Low v. People*, 2 Parker C. R. 37; *Collins v. People*, 39 Ill. 233; *Shepard v. State*, 42 Ala. 531.

(*e*) As has been already observed, it is of necessary importance that the name of the party whose goods are alleged to have been stolen should be given correctly. See notes to form 2, *supra*, pp. 20 *et seq.* In applying this principle, there are several points which it is essential to keep in mind in determining the question of property in each particular case.

1. Where goods are stolen out of the possession of the bailee, they may be described in the indictment as the property of either bailor or bailee. *Wh. Cr. L.* 8th ed. § 932; *Arch. C. P.* 10th ed. 212; *State v. Somerville*, 21 Maine, 586; *State v. Grant*, 22 Maine, 171. The cases usually given as an illustration of this rule are those of goods left at an inn (*R. v. Todd*, 2 East, P. C. 658); cloth given to a tailor to manufacture, and linen to a laundress to wash (*R. v. Packer*, 2 East, P. C. 658); chattels intrusted to a person for safe keeping (*R. v. Taylor*, 1 Leach, 356; *R. v. Slatham*, *ib.*; see *R. v. Ashley*, 1 C. & K. 198); goods levied on by a constable and in his custody (*People v. Palmer*, 10 Wend. 165); in each of these cases the property may be laid as the goods and chattels of the bailee or of the owner, at the option of the prosecutor. See 2 Hale, 181; 1 *Ib.* 613; 1 *Hawk. c.* 33, s. 47; *R. v. Bird*, 9 C. & P. 44. But the bailee of a bailee has no such special property as would authorize the goods being laid as his. Thus an indictment will be vicious which lays the property of goods taken in execution in the bailee or *receptor* of the sheriff. *Com. v. Morse*, 14 Mass. 217; *Norton v. People*, 8 Cow. 137. The property also cannot be laid in one who has neither had the actual nor constructive possession of the goods, and thus where the person named as owner was merely servant to the real owner, or where the property was laid in the master who actually had never seen or received the goods, and where in fact the servant had been specially intrusted with them, the ownership was held to be wrongly laid. *R. v. Hutchinson*, R. & R. 412; *R. v. Ruddick*, 8 C. & P. 237. But as a general rule, ownership, absolute or special, will sustain the averment. *Wh. Cr. L.* 8th ed. § 932.

2. Goods stolen from a dead person, such as the coffin or shroud, must be laid in the executors and administrators, if there be such, and if not, in the person who defrayed the expenses of the funeral. *Wh. Cr. L.* 8th ed. § 937.

3. Goods stolen from a married woman must be laid as the property of her husband, even though she lives in separation from him, with an income vested in trustees for her private use. *Wh. Cr. L.* 8th ed. § 940; *Arch. C. P.* 10th ed. 213. Under the married woman's acts, they may be laid as her own, though it is desirable to add a count averring the ownership to be in her husband. In any view he has such special ownership that a count charging him as owner is good. *Wh. Cr. L.* 8th ed. § 940 and cases there given. Where goods were stolen from a single woman, who afterwards before indictment married, it was held that the property was rightly laid in her by her maiden name. *M. v. Turner*, 1 Leach, 536.

4. At common law where the owners form an unincorporated partnership, the names of all of them must be correctly stated (*Wh. Cr. L.* 8th ed. § 935), and even where the property was temporarily vested in one of them, the names of all the members of the firm must be set out. *Hogg v. State*, 3 Blackf. 326; *R. v. Shovington*, 1 Leach, 513; *R. v. Beacall*, 1 Mood. C. C. 15 (but see *Marcus v. State*, 26 Ind. 101; *State v. Cunningham*, 21 Iowa, 433). But if the goods of a

(416) *Stealing the property of different persons.*

That defendant, on, etc., at, etc., one silver watch, of the value of forty shillings, of the goods and chattels of E. T., two hats, of the value of twenty shillings, and two waistcoats, of the value of six shillings, of the goods and chattels of (g) one G. H., then and there being found, feloniously did steal, take, and carry away, against, etc. (*Conclude as in book 1, chapter 3.*)

(417) *Larceny at a navy yard of the United States.*

That A. B., etc., on, etc., at, etc., and within the navy yard adjoining the city of Brooklyn, in the county of Kings, in the southern district of New York aforesaid, the site of which said navy yard had been before the said day of in the year last aforesaid, ceded to the said United States, and was on the said last mentioned day then and there under the sole and exclusive jurisdiction of the said United States, feloniously did take and carry away, with intent to steal and purloin (*state definitely the things taken, and the value of each separately*), said (*as before*) then and there being the property of one against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

corporation are stolen, the property must be charged to be in the corporation in its corporate name, and not in the individuals who comprise it. Wh. Cr. L. 8th ed. § 941; R. v. Patrick, 2 East, P. C. 1059; 1 Leach, 253; Arch. C. P. 10th ed. 214. It is not necessary to aver the political existence of a domestic corporation, as that is a matter for evidence, and after verdict it may be inferred from the name. *Lithgow v. Com.*, 2 Va. Cas. 296. See *supra*, p. 20.

5. Necessaries furnished by a parent to a child, may be laid as the property of either parent or child (Arch. C. P. 10th ed. 213; 2 East, P. C. 654), though it is safer to allege them to be the property of the child. R. v. Forsgate, 1 Leach, 463; R. v. Hughes, C. & M. 593. See for recent authorities Wh. Cr. L. 8th ed. § 947.

6. Where the owner is unknown it is to be so stated (*Com. v. Morse*, 14 Mass. 217; *Com. v. Manley*, 12 Pick. 173; 1 Hale, 512; Wh. Cr. L. 8th ed. § 949); though if the names of the owners appear on the trial to have been known to the grand jury at the finding of the indictment, the defendant must be acquitted. R. v. Walker, 3 Camp. 264; R. v. Robinson, Holt. N. P. C. 595. *Quære*, *Com. v. Stoddart*, 9 Allen (Mass.), 280. See fully *supra*, p. 20.

(f) Where the subject of the larceny is live cattle, "steal, take, and lead away," may be substituted. "Take," however, is essential. Wh. Cr. Pl. & Pr. § 266; 2 Hale, 184.

(g) Where the felonies are completely distinct, they ought not to be joined in the same indictment (see notes to form 2, *supra*, p. 31; Wh. Cr. Pl. & Pr. § 285), but where the transaction is the same, as where the property of different persons is taken at the same time, there seems to be no objection to the joinder. *Ibid.*; *People v. Thompson*, 28 Cal. 214.

Second count.

(*Like first count, substituting*): "then and there being of the personal goods of one ," for "then and there being the property of one ."

Third count.

(*Like second count, substituting*): "being then and there the personal goods of some person or persons to the said jurors unknown," for "then and there being of the personal goods of one ."

(*For final count, see supra, 14, 15, 16, 181 n., 239 n.*)

(418) *Larceny on the high seas.*

That A. B., etc., on, etc., at, etc., in and on board of a certain American vessel, being a called the belonging in whole or in part to a certain person or persons, then and still being a citizen or citizens of the United States of America, whose name or names are to the said jurors unknown, on the high seas, out of the jurisdiction of any particular state of the said United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, feloniously did take and carry away (*state the nature of the things taken, their particular name and value*), with intent to steal or purloin the same, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

(*Like first count, inserting after the specification of the articles taken, and before*): "with intent to steal or purloin the same," "of the personal goods of some person or persons to the said jurors unknown."

Third count.

(*Like second count, substituting*): "of the personal goods of one ," for "of the personal goods of some person or persons to the said jurors unknown."

(*For final count, see supra, 14, 15, 16, 181 n., 239 n.*)

(419) *Larceny on the high seas. Another form.*

That A. B., on, etc., at, etc., in and on board of a certain vessel being a called the belonging and appertaining, in whole or in part, to a certain person or persons then and still being a citizen or citizens of the United States of America, whose names are to the said jurors unknown, on the high seas, out of the jurisdiction of any particular state of the said United States, within the admiralty and maritime jurisdiction of the said United States of America, and of this court, feloniously did take and carry away, with intent to steal and purloin (*here state particularly each article, and the value of each separately*), of the personal goods of some person or persons to the jurors aforesaid as yet unknown, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

(*Same as first count, substituting*): “belonging and appertaining, in whole or in part, to one then and still being a citizen of the United States of America,” *for* “belonging and appertaining, in whole or in part, to a certain person or persons then and still being a citizen or citizens of the United States of America, whose names are to the said jurors unknown.”

Third count.

(*Like first count, substituting*): “of the personal goods of one ,” *for* “of the personal goods of some person or persons to the jurors aforesaid as yet unknown.”

Fourth count.

(*Like second count, substituting*): “of the personal goods of one ,” *for* “of the personal goods of some person or persons to the jurors aforesaid as yet unknown.”

(*For final count, see supra, 14, 15, 16, 17, 181 n., 239 n.*)

(420) *Larceny in an American ship at the Bahama Islands.*

That, etc., on board of a certain vessel, to wit, a sloop, called the “C. W.,” then and there belonging to S. P. W., J. C. B., and N. F., citizens of the United States, while lying in a place,

to wit, Great Harbor, in Long Island, one of the Bahama Islands, within the jurisdiction of a certain foreign sovereign, to wit, the king of the United Kingdom of Great Britain and Ireland, a certain J. P. M., otherwise called J. M., otherwise called P. M., late of the district aforesaid, mariner, then and there being a person belonging to the company of the said vessel, did take and carry away, with an intent to steal and purloin, certain personal goods of the said P. W., to wit, one quadrant, of the value of twenty dollars, one reflecting semicircle, of the value of twenty dollars, twenty-four lunar tables, of the value of twenty-four dollars, one shaving box and glass, of the value of five dollars, one chart, of the value of one dollar, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(421) *Second count. Receiving, etc.*

That, etc., on board of a certain vessel, to wit, a sloop, called the "C. W.," then and there belonging to S. P. W., J. C. B., and N. F., citizens of the United States, while lying in a place, to wit, Great Harbor, in Long Island, one of the Bahama Islands, within the jurisdiction of a certain foreign sovereign, to wit, the king of the United Kingdom of Great Britain and Ireland, the said J. P. M., otherwise called J. M., otherwise called P. M., then and there being a person belonging to the company of the said vessel, did then and there receive and buy certain goods and chattels that had been feloniously taken and stolen from a certain other person, to wit, the said S. P. W., at the district aforesaid, to wit, one quadrant, of the value of twenty dollars, one reflecting semicircle, of the value of twenty dollars, twenty-four lunar tables, of the value of twenty-four dollars, one shaving box and glass, of the value of five dollars, and one chart, of the value of one dollar, he the said J. P. M., otherwise called J. M., otherwise called P. M., then and there knowing the same to be stolen, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see ante, 14, 15, 16, 181 n., 239 n.*)

(422) *Larceny. Form in use in New York.*

That A. B., etc., on, etc., at, etc., one leathern bucket, of the value of three dollars, of the goods, chattels, and property of

one J. B., then and there being found, feloniously did steal, take, and carry away, to the great damage of the said J. B., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(422a) *Same in Maine.*

That W. W. L. of A., in the county of A. and state of M., laborer, on, etc., at, etc., two oxen, of the value of one hundred and eighty dollars, one horse, of the value of one hundred dollars, one certain riding wagon, of the value of ninety dollars, and one harness, of the value of twenty dollars, of the goods and chattels of one C. P. J., then and there being found, feloniously did steal, take, and carry away, against the peace, etc. (*h*) (*Conclude as in book 1, chapter 3.*)

(423) *Same in Pennsylvania.*(*i*) •

That A. M., late, etc., on, etc., one mare, of the value of one hundred dollars, of the goods and chattels and property of J. C., then and there being found, then and there feloniously did steal, take, and carry away, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*h*) *State v. Leavitt*, 66 Me. 440. In this case the defendant, before his arraignment, filed a special demurrer to the indictment, for causes following:—

I. That there is no possession of the goods and chattels named in said indictment, set forth therein, or that they were at the time of the alleged taking in the possession of any one.

II. That there is no trespass in the taking and carrying away set forth or alleged in said indictment.

III. That it is not alleged in and by said indictment that the articles of property therein alleged to be taken and carried away, were ever in the possession of any one, and had not been abandoned or lost by the owner; and that said indictment is in other respects informal and insufficient.

Appleton, C. J. “The indictment alleges that the defendant ‘feloniously did steal, take, and carry away, against the peace of the state, and contrary to the form of the statute in such case made and provided,’ certain described property ‘of the goods and chattels of one Charles P. Jordan, Jr.,’ etc., and the defendant by his demurrer admits that he did so. This is precisely what is forbidden by R. S., c. 120, § 1, the language of which is followed in the indictment. I think the indictment is good. I should regret the giving a sanction to what the defendant has done by declaring it no offence. Wh. Pr. 417; 2 Archbold’s Cr. Pr. & Pl. 343. The indictment is alike good at common law and by statute.”

(*i*) *Com. v. M’Mickle*, Sup. Ct. Pa., July T. 1828, No. 48. This case went up to the supreme court, after conviction in the quarter sessions of Delaware county, apparently for the purpose of testing the propriety of joining a count for the felony of larceny, with a count for the misdemeanor of receiving stolen goods. The judgment on the verdict was sustained. The form in the text is the one ordinarily used in practice in Pennsylvania. See also *Com. v. Vandyke*, March term, 1828, No. 32, where the same point was ruled.

(424) *Second count. Receiving stolen goods.*

That the said A. M., on, etc., at, etc., the goods and chattels and property aforesaid, by some ill-disposed persons (to the jurors aforesaid yet unknown) then lately before feloniously stolen, taken, and carried away, unlawfully, unjustly, and for the sake of wicked gain, did receive and have, the said A. M., then and there well knowing the goods and chattels, moneys, and property last mentioned, to have been feloniously stolen, taken, and carried away, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(425) *Same in New Jersey.*

That A. B., etc., on, etc., at, etc., one hat, of the value of one dollar, then and there being found, unlawfully did steal, take, and carry away, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(426) *Same in South Carolina.*

That A. B., etc., on, etc., at, etc., one woollen jacket, of the value of two dollars, of the proper goods and chattels of J. K., then and there being found, feloniously did steal, take, and carry away, against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said A. B., on, etc., at, etc., one other woollen jacket, of the value of two dollars, of the goods and chattels of a certain person to the jurors aforesaid unknown, then and there being found, feloniously did steal, take, and carry away, against, etc. (*Conclude as in book 1, chapter 3.*)

(427) *Same in Michigan.*

That J. K., etc., on, etc., at, etc., one gelding, of the value of one hundred and twenty-five dollars, of the goods and chattels of one J. B., then and there being, feloniously did steal, take, and lead away; against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(427a) *Same in Indiana.*

That J. S., on, etc., at, etc., unlawfully and feloniously did steal, take, and carry away, of the personal goods and chattels of one A. then and there being, of the value of four dollars, one pair of boots, contrary to the form of the statute, etc.(j) (*Conclude as in book 1, chapter 3.*)

(427b) *Larceny of notes under Mass. statute.*

That J. S., etc., on, etc., at, etc., divers promissory notes of the amount and of the value in all of five thousand dollars, a more particular description of which is to the jurors unknown, of the property, goods, and chattels of one J. N. F., in his possession then and there being, feloniously did steal, take, and carry away, etc.(k)

(428) *Bank note in North Carolina.(l)*

That T. B., etc., on, etc., at, etc., one twenty dollar bank note, issued by the president and directors of the Bank of a bank duly chartered and authorized by the state of North Carolina,(m) of the value of twenty dollars, of the goods and chattels, moneys, and property of A. B., then and there being found, then and there feloniously did steal, take, and carry away, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(429) *Bank note in Pennsylvania.(n)*

That T. B., on, etc., at, etc., one promissory note for the payment of money, commonly called a bank note, purporting to be

(j) It was held in Indiana, that while this indictment was somewhat transposed and out of the usual form, it substantially and sufficiently charged a larceny of the personal goods of the party named. *King v. State*, 44 Ind. 285.

(k) Sustained in *Com. v. Butts*, 124 Mass. 449. See *supra*, pp. 381-4-5.

(l) This form seems approved by the court in *State v. Rout*, 3 Hawks, 618.

(m) Or, in another case, "a certain twenty dollar bank note, issued by the president and directors of the Bank of Newbern." *State v. Williamson*, 3 Murph. 216. It is now proper to aver that the note was issued by the bank in question, and that the bank was duly authorized, etc. *State v. Brown*, 8 Jones, L. (N. C.), 443; *supra*, p. 382.

(n) This form was the one usually employed under the old statutes. *M'Laughlin v. Com.*, 4 R. 464; *Com. v. M'Dowell*, 1 Browne, 359; *Stewart v. Com.*, 4 S. & R. 194; *Spangler v. Com.*, 3 Binn. 533. Under the rev. act of 1860, it is sufficient if the common title of a stolen document be given. See *supra*, p. 381.

issued by the (*president and directors of the bank of, etc., as the case may be*), for the payment of five dollars, being still due and unpaid, of the value of five dollars, of the goods and chattels, moneys, and property of A. B., then and there being found, then and there feloniously did steal, take, and carry away, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(430) *Bank note in Connecticut.(o)*

That T. B., etc., on, etc., at, etc., thirteen bills against the Hartford Bank, each for the payment and of the value of ten dollars, issued by such bank, being an incorporated bank in this state, of the value of one hundred and thirty dollars, of the goods and chattels, moneys, and property of A. B., then and there being found, then and there feloniously did steal, take, and carry away, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(431) *Bank note in Tennessee.(p)*

That defendant, on, etc., at, etc., one bank note of the Planters' Bank of Tennessee, payable on demand at the Mechanics' and Traders' Bank at New Orleans, of the value and denomination of five dollars, the bank note, personal goods, and chattels of J. B., then and there being, feloniously did steal, take, and carry away, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(431a) *Stealing bank note in Iowa.*

That defendant "did feloniously steal, take, and carry away divers bank bills, commonly known and denominated national currency, of divers denominations, the number and denomination of which are to the grand jury unknown, of the amount and value of six hundred and fifty dollars, which said bank bills circulated and passed as money, and which were then and there the property and in the possession of one J. J. P.," etc.(q) (*Conclude as in book 1, chapter 3.*)

(o) This form was sanctioned in *Salisbury v. State*, 6 Conn. 101.

(p) *State v. Hite*, 9 Yerg. 358.

(q) Sustained in *State v. Hoppe*, 39 Iowa, 468. See further as to description, notes to 415; *supra*, pp. 384 *et seq.*

(431b) *Stealing bank notes of unknown banks.*(r)

That A. B., etc., on, etc., at, etc., sundry bank bills, of some banks respectively to the said jurors unknown, of the amount and value in all of thirty-eight dollars, of the property, goods, and chattels of one C. D., in his possession then and there being, feloniously did steal, take, and carry away, etc. (*Conclude as in book 1, chapter 3.*)

(432) *Larceny in dwelling-house in daytime.* Mass. Rev. Sts. ch. 126, § 14.(s)

That defendant, at, etc., on, etc., one certain original book of accounts concerning money due, of the value of twenty dollars, one receipt, release of defeasance, containing an acquittance of money due, of the value of six dollars, and sundry bank bills, amounting together to the sum of eleven dollars, and of the value of eleven dollars, of the goods and chattels of one A. B., in the dwelling-house of one C. D. there situate, in the said A. B.'s possession then and there being, did then and there, in the said dwelling-house (in the daytime),(t) feloniously steal, take, and carry away, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(432a) *Larceny in a building in Massachusetts.*

That (the defendant), on, etc., at, etc., certain, etc. (*describing things taken*), of the property, goods, and moneys of J. G., in a certain building there situate, to wit, the dwelling-house of one P. McG., and then and there in the possession of the said J. G. being found, feloniously did steal, take, and carry away, against, etc. (*Conclude as in book 1, chapter 3.*)(u)

(r) This was sustained in *Com. v. Grimes*, 10 Gray, 470.

(s) *Com. v. Williams*, 9 Met. 273. In this case it was held, that a memorandum book, kept by a person who works for a tailor by the piece, and in which entries are made of the names of the persons owning the garments worked upon, and the prices of the work, is a "book of accounts for or concerning money or goods due, or to become due, or to be delivered," within the revised statutes, ch. 126, § 17, and is the subject of larceny. And such book, given by a tailor to the person who works for him, for the purpose of such entries being made therein, is the property of such person, and not of the tailor.

(t) Where the larceny is in the night, it falls within stat. 1843, ch. 1, § 1, and the averment in brackets is to be left out, and ("in the night-time of the said day") inserted in its place. See *Tr. & H. Prec.* 346.

(u) Sustained in *Com. v. Smith*, 111 Mass. 429.

(433) *Breaking and entering a vessel in the night-time, and committing a larceny therein, under Mass. Rev. Sts. ch. 126, § 11.(v)*

That C. D., etc., on, etc., at, etc., a certain vessel of one A. B., called the "Sally," of Boston, within the body of the said county of S. then and there lying and being, in the night-time of the said day, did break and enter, and one trunk, of the value of five dollars, and (*here state the kind and value of each article*), of the goods and chattels of one E. F., in the trunk aforesaid then and there contained, and in the vessel aforesaid then and there being found, in the night-time of the said day, feloniously did steal, take, and carry away, in the vessel aforesaid, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(434) *Breaking and entering a shop in the night, and committing a larceny therein, under Mass. Rev. Sts. ch. 126, § 11.(w)*

That C. D., etc., on, etc., at, etc., the shop of one A. B., there situate, in the night-time of the same day, did break and enter, and sundry bank bills, amounting together to the sum of one hundred dollars, and of the value of one hundred dollars, and (*here insert all the articles stolen, alleging the kind, number, and value of each*), of the goods and chattels of the said A. B., then and there in the shop aforesaid being found, feloniously did steal, take, and carry away, in the shop aforesaid, against, etc. (*Conclude as in book 1, chapter 3.*)

(435) *Larceny by the cashier of a bank. Mass. Stat. 1846, ch. 171, § 1.(x)*

That A. B., late of, etc., on the first day of June, in the year of our Lord at D., in the county of N., the said A. B., then and there being an officer, to wit, the cashier, of the Dedham Bank, a corporation then and there duly and legally estab-

(v) Davis's Prec. 143.

(w) See Tr. & H. Prec. 344; Davis's Prec. 142. The coupling in this form of the "breaking and entering" with the larceny, is not duplicity. *Com. v. Tuck*, 20 Pick. 356. It was first held essential, however, that the averment in brackets, which was omitted by Mr. Davis, should be inserted; *Ib.*; but the court since appears to have settled into a contrary doctrine. *Devoe v. Com.*, 3 Met. 316; *Phillips v. Com.*, *Ib.* 588. This indictment, it is intimated in the latter case, would be good under Revised Statutes, ch. 126, § 11.

(x) Tr. & H. Prec. 341.

lished, organized, and existing under and by virtue of the laws of this commonwealth, as an incorporated bank, did feloniously and fraudently convert to the said A. B.'s own use certain money, to a certain large amount, to wit, to the amount and sum of one hundred thousand dollars, and of the value of one hundred thousand dollars, of the property and moneys of the said president, directors, and company of the Dedham Bank, being in their banking-house there situate: whereby and by force of the statute in such case made and provided, the said A. B. is deemed to have committed the crime of larceny in said bank. And so the jurors aforesaid, upon their oath aforesaid, do say that the said A. B., then and there, in manner and form aforesaid, the aforesaid money, of the property and moneys of the said president, directors, and company of the Dedham Bank, feloniously did steal, take, and carry away, in the banking-house aforesaid; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(436) *Breaking and entering a stable in the night-time, and committing a larceny therein.* Mass. Stat. 1851, ch. 156, § 1.(y)

That C. D., late of, etc., laborer, on the first day of June, in the year of our Lord with force and arms, at B. aforesaid, in the county aforesaid, a certain building, to wit, the stable, of one E. F., there situate, in the night-time of said day, feloniously did break and enter, and one chaise, of the value of one hundred dollars, one saddle, of the value of ten dollars, and one bridle, of the value of five dollars, of the goods and chattels of the said E. F., then and there in the stable aforesaid being found, then and there, in the night-time, feloniously did steal, take, and carry away, in the stable aforesaid; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(437) *Breaking and entering a shop in the night-time, adjoining to a dwelling-house, with intent to commit the crime of larceny, and actually stealing therein.* Mass. Stat. 1839, ch. 31.(z)

That Joseph H. Josslyn, late of, etc., on the first day of February, in the year of our Lord with force and arms, at

(y) Tr. & H. Prec. 342.

(z) Tr. & H. Prec. 343.

Waltham, in the county of Middlesex, the shop of one Charles W. Fogg, there situate, adjoining to a certain dwelling-house,(a) in the night-time, did break and enter, with intent the goods and chattels of said Fogg, then and there in said shop being found, feloniously to steal, take, and carry away;(b) and one English gold lever watch, of the value of one hundred dollars, and one gold Lepine watch, of the value of one hundred dollars, nine old silver watches, each of the value of ten dollars,(c) of the goods and chattels of the said Charles W. Fogg, then and there in the shop of the said Fogg being found, then and there, in the night-time, feloniously did steal, take, and carry away, in the shop aforesaid; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.

(438) *Entering a dwelling-house in the night-time, without breaking, some persons being therein, and being put in fear.* *Mass. Rev. Sts. ch. 126, § 12.(d)*

That C. D., late of, etc., on the first day of June, in the year of our Lord with force and arms, at D., in the county of N., the dwelling-house of A. B., there situate, in the night-time of said day, feloniously did enter, without breaking the same, with intent then and therein to commit the crime of larceny; one A. B., and M., his wife, then, to wit, at the time of the committing of the felony aforesaid, lawfully being in the said dwelling-house, and by the said C. D. were then and there put in fear; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(a) It is not necessary to aver that the shop was or was not "adjoining to a dwelling-house." *Larned v. Com.*, 12 Metc. 240; *Devoe v. Com.*, 3 Metc. 316. See *Com. v. Tuck*, 20 Pickering, 356; *R. v. Marshall*, 1 Moody, C. C. 158.

(b) This, say Tr. & Heard, is a sufficient averment. The words of the Stat. 1839, ch. 31, are, "with intent to commit the crime of larceny." But it is not necessary to aver the intent in the words of the statute. *Josslyn v. Com.*, 6 Metc. 236.

(c) Where an indictment for breaking and entering a building, with intent to steal therein, is correctly framed, an additional charge, that the defendant committed a larceny therein, though defective, and such as would not of itself be a sufficient indictment for larceny, is no cause for reversing a judgment rendered on a general verdict of guilty. *Larned v. Com.*, 12 Metc. 240.

(d) Tr. & H. Prec. 345.

- (439) *Breaking and entering a dwelling-house in the daytime, the owner being therein, and being put in fear.* *Mass. Rev. Sts. ch. 126, § 12.(e)*

That C. D., late of, etc., on the first day of June, in the year of our Lord with force and arms, at D., in the county of N., the dwelling-house of one A. B., there situate, in the daytime, feloniously did break and enter, with intent then and therein to commit the crime of larceny; the said A. B., and M., his wife, then, to wit, at the time of the committing of the felony aforesaid, lawfully being in said dwelling-house, and by the said C. D. were then and there put in fear; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

- (440) *Breaking and entering a city hall, and stealing therein, in the night-time.* *Mass. Rev. Sts. ch. 123, § 14.(f)*

That John Williams, late of, etc., on the twelfth day of November, in the year of our Lord with force and arms, at Charlestown, in the county of Middlesex aforesaid, the city hall of the city of Charlestown, in said county, there situate, and erected for public uses, to wit, the transaction of the municipal business of said city of Charlestown, in the night-time of the said day, feloniously did break and enter, and ten pieces of gold coin, current within this commonwealth by the laws and usages thereof, called eagles, of the value of ten dollars each, ten other pieces of gold coin, current within this commonwealth by the laws and usages thereof, called sovereigns, of the value of five dollars each, of the goods and chattels and moneys of the said city of Charlestown, then and there in the city hall aforesaid being found, then and there, in the night-time, feloniously did steal, take, and carry away, in the city hall aforesaid, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(e) Tr. & H. Prec. 345.

(f) Tr. & H. Prec. 347. In an indictment under this section of the statute, for breaking and entering in any of the buildings therein mentioned, the amount or value of the property stolen is immaterial. And it is a sufficient allegation as to the stealing, if there is a larceny properly and technically charged of any of the goods alleged in the indictment to be stolen. *Com. v. Williams*, 2 Cushing, 582.

(441) *Stealing in a building that is on fire.* *Mass. Rev. Sts. ch. 126, § 15.(g)*

That C. D., late of, etc., on the first day of June, in the year of our Lord at S., in the county of E., with force and arms, one gold watch, of the value of one hundred dollars, one gold ring, of the value of ten dollars, and one gold bracelet, of the value of twenty dollars, of the goods and chattels of one E. F., in a certain building, to wit, the dwelling-house of the said E. F., there situate, then and there being, which said dwelling-house was then and there on fire, then and there feloniously did steal, take, and carry away, in the dwelling-house aforesaid, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(442) *Larceny from the person.* *Rev. Sts. of Mass. ch. 126, § 16.(h)*

That C. D., late of L., in the county of M., laborer, on the first day of June, in the year of our Lord with force and arms, at L., in the county of M., one gold watch, of the value of one hundred dollars, of the goods and chattels of one E. F., then and there, from the person of the said E. F., feloniously did steal, take, and carry away, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(443) *Larceny of real property.* *Mass. Sts. 1851, ch. 151.(i)*

That C. D., late of C., in the county of M., laborer, on the first day of June, in the year of our Lord with force and arms, at C., in the county of M., fifty pounds weight of lead, each of the value of ten cents, of the property of one A. B., and against the will of the said A. B., then and there being parcel of the realty, to wit, of the dwelling-house of the said A. B., there situate, wilfully and maliciously did rip, cut, and break, and then and there did take and carry away the same, with intent then and there the same feloniously to steal, take, and carry away; whereby and by force of the statute in such case made and provided, the said C. D. is guilty of the crime of simple larceny.

(g) Tr. & H. Prec. 348.

(h) Tr. & H. Prec. 349. See *Com. v. Dimond*, 3 Cushing, 235; *Com. v. Eastman*, 2 Gray.

(i) Tr. & H. Prec. 349.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D., then and there, in manner and form aforesaid, the lead aforesaid, of the property of the said A. B., feloniously did steal, take, and carry away, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(443a) *Stealing and receiving goods stolen in warehouse, under Mass. statute.*

And the jurors aforesaid, for, etc., on their oath aforesaid, do further present, that L. M. and J. H., otherwise called F. H., of B. aforesaid, on, etc., at, etc., with force and arms, two thousand pairs of stockings, each pair of the value of one dollar, of the property, moneys, goods, and chattels of one G. F. H., in a certain building there situated, to wit, the warehouse of the said H. and in his possession then and there being, did then and there in the said building, feloniously steal, take, and carry away, against the peace, etc. (*Conclude as in book 1, chapter 3.*)

And the jurors aforesaid, for, etc., on their oath aforesaid, do further present, that J. C., of B. aforesaid, on, etc., at, etc., with force and arms, the property, goods, and chattels aforesaid, so as aforesaid stolen, taken, and carried away, feloniously did buy, have, receive, and aid in concealment of; he, the said C., then and there well knowing the said property, goods, and chattels to have been feloniously stolen as aforesaid; against the peace, etc.(j) (*Conclude as in book 1, chapter 3.*)

(444) *Larceny and embezzlement of public property, on the statute of the United States of the 30th April, 1790, § 26.(k)*

That A. B., etc., on, etc., at, etc., being a person having the charge and custody of certain arms and other ordnance and munitions of war belonging to the United States, certain arms, to wit, ten muskets,(l) of the value of one hundred dollars, of the property, goods, and chattels of the said United States, furnished and intended for the military service thereof, in the

(j) Sustained in *Com. v. Cohen*, 120 Mass. 198.

(k) Davis's Prec. 149. Gordon's Digest, art. 3641, p. 714. See *post*, 460, *et seq.*

(l) The same form is to be adopted as to all the other articles and property enumerated in the statute.

charge and custody of the said A. B. then and there being, did embezzle, steal,^(m) purloin, and knowingly and wilfully misappropriate, and sell and dispose of, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(445) *Stealing, destroying, or concealing will, under statute 24 and 25 Vict.*

(*Commencement as in prior forms*)—a certain will and testamentary instrument of one J. N. feloniously did steal, take, and carry away (or feloniously and for a fraudulent purpose did conceal, destroy, obliterate, or did conceal), against, etc.⁽ⁿ⁾ (*Conclude as in book 1, chapter 3.*)

(445a) *Stealing documents of title to real estate, under statute 24 and 25 Vict.*

(*Commencement as in prior forms*)—a certain deed, the property of J. N., being (or containing) evidence of the title (or of part of the title) of the said J. N. to a certain real estate (or, to part of a certain real estate) called *Whiteacre*, in which said real estate the said J. N. then had, and still hath, an interest, feloniously did steal, take, and carry away (or, feloniously and unlawfully, and for a fraudulent purpose did destroy; “destroy, obliterate, or conceal”), against, etc.^(o) (*Conclude as in book 1, chapter 3.*)

(445b) *Stealing valuable securities, under 24 and 25 Vict.*

(*Commencement as in prior forms*)—a certain valuable security, other than a document of title to lands, to wit, one bill of exchange, for the payment of ten pounds, the property of J. N., the said sum of ten pounds, secured and payable by and upon the said bill of exchange, being then due and unsatisfied to the said J. N., feloniously did steal, take, and carry away, against, etc.^(p) (*Conclude as in book 1, chapter 3.*)

(m) In the original section of the statute on which this form was drawn, the word *purloin* is used in the former part, and the word *stolen* in the latter part for the same purpose. The form in the text is adapted to Rev. Stat., tit. xiv. art. 60.

(n) Arch. C. P. 19th ed. p. 393, citing *R. v. Morris*, 9 C. & P. 89.

(o) Arch. C. P. 19th ed. p. 394.

(p) Arch. C. P. 19th ed. p. 408; citing *R. v. Lowrie*, L. R. 1 C. C. R. 61.

(445*c*) *Stealing lead, etc., under 24 and 25 Viet.*

(*Commencement as in prior forms*)—sixty pounds' weight of lead, the property of J. N., then being fixed to the dwelling-house (*describing building so as to meet statute*) of the said J. N., situate in, etc., feloniously did steal, take, and carry away (*or*, feloniously did rip, cut, sever, and break, *following statute*, with intent the same feloniously to steal, take, and carry away), against, etc.(*q*) (*Conclude as in book 1, chapter 3.*)

(445*d*) *Stealing or cutting trees, etc., with intent to steal, under 24 and 25 Viet.*

(*Commencement as in prior forms*)—one ash-tree (*describing so as to meet statute*), of the value of six pounds, the property of J. N., then growing in a certain close (*following statute*) of the said J. N. situate, etc., in the said close, feloniously did steal, take, and carry away (*or*, feloniously did cut, *taking either alternative of the statute*, with intent the same feloniously to steal, take, and carry away; thereby then doing injury to the said J. N. to an amount exceeding the sum of five pounds, to wit, to the amount of six pounds), against, etc.(*r*) (*Conclude as in book 1, chapter 3.*)

(*q*) Arch. C. P. 19th ed. p. 405. That venue must be in place of offence, see *R. v. Miller*, 7 C. & P. 665.

(*r*) Arch. C. P. 19th ed. p. 399.

CHAPTER VI.

RECEIVING STOLEN GOODS.(a)

- (450) General frame of indictment.
- (452) Against receiver of stolen goods. Mass. Rev. Sts. ch. 126, § 20.
- (453) Same in New York.
- (454) Same in Pennsylvania.
- (455) Against a receiver of embezzled property. Mass. Stat., 1853, ch. 184.
- (456) Receiving stolen goods from some unknown person, in Pennsylvania.
- (457) Same in South Carolina.
- (458) Same in Tennessee.
- (459) Soliciting a servant to steal, and receiving the stolen goods.
- (459a) Receiving and concealing, under Indiana statute.

(450) *General frame of indictment.(b)*

That A. B., in the county aforesaid, one silver tankard, of the value of two pounds, of the goods and chattels(c) of one J. M., before then feloniously stolen,(d) taken, and carried away,

(a) For offence generally, see Wh. Cr. L. 8th ed. § 942.

(b) This offence, so far as it may be considered as a corollary of larceny, is treated of, *supra*, 415, note. The form in the text, with the accompanying notes, though based on the English statute, is useful for reference generally; that statute having been substantially re-enacted throughout the Union.

(c) A variance in this particular will be fatal. Wh. Cr. L. 8th ed. § 1002; *People v. Wiley*, 3 Hill, N. Y. R. 194. If, however, as in larceny, the crime be established in respect to only a single article, though the indictment describe several, the defendant may be convicted. Thus where, on the trial of an indictment which misdescribed a part of the goods, but contained a sufficient description of the residue, the jury were instructed by the court below that there was no misdescription whatever, and a general verdict of guilty was rendered: it was held on review that the erroneous instruction constituted no ground for a new trial, inasmuch as it appeared by the bill of exceptions that the question of the defendant's guilt was identical in respect to the whole of the goods, he having received them, if at all, from the same person by a single act. *People v. Wiley*, 3 Hill, N. Y. R. 194.

(d) The indictment need not give the name of the principal felon. *R. v. Jervis*, 6 C. & P. 156; *R. v. Wheeler*, 7 C. & P. 170; *R. v. Pulham*, 9 C. & P. 280; *Com. v. State*, 11 Gray, 60; *People v. Caswell*, 21 Wend. 86; *Schriedley v. State*, 23 Oh. St. 130; *Swaggerty v. State*, 9 Yerg. 338; *State v. Smith*, 37 Mo. 58. It is not essential in such case to aver that the principal felon or thief had been convicted. *Ib.* But in some jurisdictions the name of the thief

(feloniously)(e) did receive and have (he the said A. B. then and there well knowing)(f) the said goods and chattels to have been feloniously stolen, taken, and carried away),(g) against, etc. (*Conclude as in book 1, chapter 3.*)

(*For form in U. S. courts, see ante, 421.*)

(452) *Against receiver of stolen goods.* *Mass. Rev. Sts. ch. 126,*
§ 20.

That C. D., late, etc., on, etc., at, etc. (one hat, of the value, etc., *here enumerate the articles, and the value of each*), of the goods and chattels of one E. F., then and there in the possession of the said E. F. being found, feloniously did steal, take,(h) and carry away; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that G. H., late of, etc., laborer, afterwards, to wit, on the first day of July, in the year of our Lord with force and arms, at B. aforesaid, in the county aforesaid, the goods and chattels aforesaid, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have, and did then and there aid in the concealment of the same, the said G. H. then and there well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

is averred; and it may be prudent to insert it if known, or to allege it to be unknown. Wh. Cr. L. 8th ed. § 997. When the indictment states the larceny to have been committed by some persons to the jurors unknown, it is no objection that the grand jury at the same assizes find a bill for the principal felony, against J. S. R. v. Bush, R. & R. 372. An indictment charging that a certain evil-disposed person feloniously stole certain goods, and that C. D. and E. F. feloniously received the said goods, knowing them to be stolen, was held good against the receivers, as for a substantive felony. R. v. Caspar, 2 Mood. C. C. 101; 9 C. & P. 289.

The time and place, when and where the goods were stolen, need not be stated in the indictment. State v. Holford, 2 Blackf. 103; 1 Leach, 109, 477.

(e) Of course where the offence is a misdemeanor, as in Pennsylvania, the word "feloniously" must be omitted.

(f) This is essential. Wh. Cr. L. § 164; R. v. Larkin, Dears. 365; 6 Cox C. C. 377. See for other cases Wh. Cr. L. 8th ed. § 999.

(g) "Taken and carried away" are not necessary when "stolen" is used. Com. v. Lakeman, 5 Gray, 82.

(h) See Com. v. Lakeman, 5 Gray, 82.

(453) *Same in New York.*

That O. M. H., etc., at, etc., on, etc., one mare, of the value of eighty dollars, of the goods and chattels of one B. M., by a certain ill-disposed person, feloniously did receive and have, he the said O. M. H. then and there well knowing the said goods and chattels to have been feloniously stolen, taken, carried, and led away, to the great damage, etc.(i) (*Conclude as in book 1, chapter 3.*)

(454) *Same in Pennsylvania.*

That A. B., etc., on, etc., at, etc., one hat, of the value of five dollars, of the goods and chattels, moneys, and property of E. F., by C. D. then lately before feloniously stolen, taken, and carried away, unlawfully, unjustly, and for the sake of wicked gain did receive and have (the said A. B. then and there well knowing the goods and chattels, moneys, and property aforesaid, to have been feloniously stolen, taken, and carried away), contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(455) *Against a receiver of embezzled property. Mass. Stat. 1853, ch. 184.(j)*

That C. D., late of F., in the county of M., trader, on the first day of June, in the year of our Lord at F. aforesaid, in the county aforesaid, being then and there employed as clerk of one J. N., the said C. D. not being then and there an apprentice to the said J. N., nor a person under the age of sixteen years, did, by virtue of his said employment, then and there, and whilst he was so employed as aforesaid, take into his possession certain money, to a large amount, to wit, to the amount of fifty dollars, of the moneys of the said J. N., his employer, and the said money then and there feloniously did embezzle and fraudulently convert to his own use, without the consent of the said J. N.; whereby, and by force of the statute in such case made and provided, the said C. D. is deemed to have committed the crime of simple larceny. And the jurors aforesaid, upon their

(i) *Hopkins v. People*, 12 Wend. 76. It is not necessary to allege that any consideration passed between the receiver and the thief.

(j) *Tr. & H. Prec.* 450.

oath aforesaid, do further present, that the said C. D. then and there, in manner and form aforesaid, the said money, the property of the said J. N., his said employer, from the said J. N. feloniously did steal, take, and carry away ; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that G. H., late of F., in the county aforesaid, laborer, afterwards, to wit, on the first day of July, in the year of our Lord at F. aforesaid, in the county aforesaid, the money aforesaid, so as aforesaid feloniously embezzled, feloniously did receive and have, and did then and there aid in concealing the same, the said G. H. then and there well knowing the said money to have been embezzled as aforesaid; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(456) *Receiving stolen goods from some unknown person, in Pennsylvania.*(k)

That M. J., late of the said county, spinster, being a person of evil name and fame, and of dishonest conversation, and a common buyer and receiver of stolen goods, on, etc., at, etc., one hundred yards of fine thread lace, of the value of twenty-five pounds, of the goods and chattels of J. S., by a certain ill-disposed person to the jurors aforesaid yet unknown then lately before feloniously stolen, of the same ill-disposed person, unlawfully, unjustly, and for the sake of wicked gain, did receive and have, she the said M. J. then and there well knowing the said goods and chattels to have been feloniously stolen, to the great damage of the said J. S., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(457) *Same in South Carolina.*

That A. B., etc., on, etc., at, etc., one tin kettle, of the value of one dollar, of the proper goods and chattels of E. F., by C. D. then lately before feloniously stolen, taken, and carried away, of and from the said C. D., unlawfully, unjustly, and for the sake of wicked gain, did buy and receive, the said A. B. then and

(k) Drawn by Wm. Bradford, Esq., at the time attorney-general of the commonwealth.

there well knowing the aforesaid goods and chattels to have been feloniously stolen, taken, and carried away; against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said A. B., on, etc., at, etc., one other tin kettle, of the value of one dollar, of the proper goods and chattels of the said E. F., by a certain evil disposed person, to the jurors aforesaid unknown, then lately before feloniously stolen, taken, and carried away, of and from the said evil disposed person, unlawfully, unjustly, and for the sake of wicked gain, did buy and receive, the said A. B. then and there well knowing the aforesaid goods and chattels to have been feloniously stolen, taken, and carried away; against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(458) *Same in Tennessee.*(*l*)

That S. D. S., etc., on, etc., at, etc., two sides of upper leather, of the value of five dollars, of the goods and chattels of one M. H. B., then lately before feloniously and fraudulently stolen, did then and there receive and have, he the said S. then and there well knowing the said goods and chattels to have been feloniously and fraudulently stolen, taken, and carried away, with intent to deprive the true owner thereof,(*m*) contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(459) *Soliciting a servant to steal and receiving the stolen goods.*(*n*)

That E. D., etc., on, etc., at, etc., falsely, subtly, and unlawfully did solicit, entice, and persuade one M. P., servant of W. S., of the same county, yeoman, secretly and clandestinely to take and embezzle divers goods and chattels of the said W. S., and to give and deliver such goods and chattels to her the said E., and that the said E. afterwards, the said third day of May, in the year aforesaid, at the county aforesaid, two pounds of coffee, one quarter of a pound of candles, one pound of soap, ten pounds of flour, one pound of bread, half a pint of rum, of the value of six

(*l*) This form was held good in *Swaggerty v. State*, 9 Yerg. 338.

(*m*) This allegation is vital. *Hurrell v. State*, 5 Humph. 68.

(*n*) See for "Attempts to commit Offences," *infra*, 1046, etc.

shillings and sixpence, lawful money of Pennsylvania, of the goods and chattels of the said W. S., by the said M., then lately before on the same day and year above mentioned, by the solicitation, incitement, and persuasion of the said E., taken and embezzled, then and there falsely, knowingly, subtly, and unlawfully did receive, obtain, and have, of and from the said M., to the great damage of the same W. S., to the evil example of all others in the like case offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(459a) *Receiving and concealing under Indiana statute.*

That M. K., on, etc., at, etc., did feloniously buy, receive, conceal, and aid in the concealment of eleven hogs, of the value of twelve dollars each, the said hogs then and there being the property of S. H., G. W. P., and O. W. K.; which said hogs, prior to the time they were so bought, received, and concealed by said K., had been feloniously stolen, taken, and carried away, at said county, by some person to said jurors unknown; he, the said K., at the time he so bought, received, concealed, and aided in the concealing of said hogs, well knowing that the same had been stolen, contrary, etc.(o) (*Conclude as in book 1, chapter 3.*)

(o) It was held in Indiana that this indictment was good, though it did not show the time when the hogs were stolen, and that they were the subject of larceny at the time they were so received. *Kaufman v. State*, 49 Ind. 248.

EMBEZZLEMENT.

CHAPTER VII.

EMBEZZLEMENT.(a)

- (460) Against officer of the United States mint, for embezzling money intrusted to him.
- (461) Against same person for same, charging him with being a person employed at the mint.
- (462) Against auctioneer for embezzlement, under the Mass. Rev. Sts. ch. 126, § 30.
- (463) Second count, larceny.
- (464) General form of indictment in New York.
- (465) Second count, larceny.
- (465a) Against cashier of national bank for embezzlement.
- (466) Against the president and cashier of a bank for an embezzlement. Rev. Sts. of Mass. ch. 126, § 17.
- (467) Against a clerk for embezzlement. Rev. Sts. of Mass. ch. 126, § 29.
- (467a) Another form.
- (468) Against a carrier for embezzlement. Rev. Sts. of Mass. ch. 126, § 30.
- (468a) Against bailee for embezzlement, under Mass. Gen. Stat.
- (469) Embezzlement by clerk or servant, in England.
- (469a) Another form.
- (469b) Another form.
- (469c) Against banker for conversion, under English statute.
- (469d) Against banker for misappropriating, etc.
- (469e) Against jailor, under English statute.
- (469f) Against trustee, under English statute.
- (469g) Against director of company for embezzlement, under English statute.
- (469h) Against same for publishing false statement, under English statute.

(a) (*Embezzlement at common law.*) In general an indictment for a mere breach of trust, not amounting to larceny, will not lie at common law. But where this breach of trust is committed by a public officer misapplying the funds with which he is intrusted for the benefit of the public, he may be indicted for a misdemeanor in respect of his public duty. Thus an indictment will lie at common law against overseers for embezzlement, giving false accounts, or not accounting (see forms in 3 Chit. C. L. 701 *et seq.*), and against surveyors of highways for embezzlement of gravel.

See for embezzlement generally, Wh. Cr. L. 8th ed. § 1009. As to indictment, see Wh. Cr. L. 8th ed. §§ 1044 *et seq.* As to joinder of counts, *ib.* § 1047. The goods embezzled must be set out as accurately as the nature of the case admits, as in larceny. Wh. Cr. L. 8th ed. § 1044; *supra*, pp. 380 *et seq.* It is not necessary to aver from whom the money was received. *R. v. Beacell*, 1 C. & P. 310.

- (469i) Against partner, under English statute.
- (469j) Against constable, under English statute.
- (469k) Fraudulent bankruptcy in England.
- (469l) Ticket scalping.

(460) *Against officer of the U. S. mint, for embezzling money intrusted to him.*

That R. H., etc., on, etc., at, etc., then and there being an officer of the United States * charged with the safe-keeping, transfer, and disbursement of public moneys, unlawfully and feloniously did convert to his own use and embezzle a portion of the said public moneys intrusted to him the said R. H. for safe-keeping, transfer, and disbursement, to wit, † the following coins of gold which had been struck and coined at the mint of the United States (*stating the coins*), altogether of the value of twenty-three thousand two hundred and thirty-eight dollars and sixty-one cents, the said coins of gold and the said coins of silver and the said coins of copper being, at the time of committing the felony aforesaid, the property of the United States of America, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

(*Same as first, except inserting at * the averment*): “to wit, a clerk of the mint of the United States for the treasurer of the said mint.”

Third count.

That the said R. H., on, etc., at, etc., then and there being an officer of the United States, having the safe-keeping and disbursement of the ordinary fund for paying the expenses of the mint of the United States, and charged with the safe-keeping, transfer, and disbursement of public moneys, unlawfully and feloniously did convert to his own use and embezzle a portion of the public money intrusted to him the said R. H. for safe-keeping, transfer, and disbursement, to wit, the following other coins of gold, which had been struck and coined at the mint of the United States (*stating coins, and concluding as in first count*).

Fourth count.

That the said R. H., on, etc., at, etc., then and there being an agent of the United States, charged with the safe-keeping, transfer, and disbursement of public moneys, unlawfully and feloniously did convert to his own use and embezzle a portion of the public moneys intrusted to him the said R. H. for safe-keeping, transfer, and disbursement, to wit (*proceeding as in first count from †*).

Fifth count.

That the said R. H., on, etc., at, etc., then and there being an agent of the United States, to wit, a clerk of the mint of the United States for the treasurer of the said mint, charged with the safe-keeping, transfer, and disbursement of public moneys, unlawfully and feloniously did convert to his own use and embezzle a portion of the public moneys intrusted to him the said R. H. for safe-keeping, transfer, and disbursement, to wit, the following other coins of gold, which had been struck and coined at the mint of the United States (*stating coins, and concluding as in first count*).

Sixth count.

That the said R. H., on, etc., then and there being an agent of the United States, having the safe-keeping and disbursement of the ordinary fund for paying the expenses of the mint of the United States, and charged with the safe-keeping, transfer, and disbursement of public moneys, unlawfully and feloniously did convert to his own use and embezzle a portion of the public moneys intrusted to him the said R. H. for safe-keeping, transfer, and disbursement, to wit, the following other coins of gold, which had been struck and coined at the mint of the United States (*stating coins, and concluding as in first count*).

Seventh count.

That the said R. H., on, etc., at, etc., then and there being a person charged by law with the safe-keeping, transfer, and disbursement of the public moneys, unlawfully and feloniously did convert to his own use and embezzle a portion of the public moneys intrusted to him the said R. H. for safe-keeping, trans-

fer, and disbursement, to wit, the following other coins of gold, which had been struck and coined at the mint of the United States (*stating coins and concluding as in first count*).(*b*)

(*For final count, see ante, 14, 15, 16, 181, n., 239, n.*)

(*b*) *U. S. v. Hutchinson*, Penn. L. J. for June, 1848 (7 Penn. L. J. 365). The prisoner having been convicted, a new trial was granted on grounds which, as will be seen, do not affect the character of the indictment. Kane, J.: "By the act of congress of 18th January, 1837, it is enacted that 'the officers of the mint of the United States shall be a director, a treasurer, a melter and refiner, a chief coiner, and an engraver,' and these are to be appointed by the president with the advice and consent of the senate. Of the treasurer so appointed, it is required among other things, § 2, that 'he shall receive and safely keep all moneys which shall be for the use and support of the mint; shall keep all the current accounts of the mint, and pay all moneys due from the mint, on warrants from the director.' The act then provides for the appointment of assistants to certain of the officers, and of clerks for the director and for the treasurer, in case they shall be needed; they are to be appointed by the director of the mint, with the approbation of the president of the United States; the assistants 'to aid their principals,' and the clerks to 'perform such duties as shall be prescribed for them by the director;' § 3.

"The prisoner was appointed under this act in the year 1840, to be a clerk for the treasurer of the mint, and among the duties prescribed for him by the director was the charge of the *ordinary or contingent fund*, by which name the moneys for the ordinary uses of the mint were designated. In this capacity he received the moneys of that fund as they were remitted or transferred to the treasurer of the mint by the orders of the treasury department, and paid them out as warrants were drawn upon the treasurer of the mint by the director, making the proper entries of such receipts and payments in the books of account of the mint. He had the key of a closet in which the moneys of this fund were kept, but the outer key of the vault, of which the closet formed part, was in the charge of another person. The books of account were, all of them, kept in the name and on behalf of the treasurer; the acknowledgments for all moneys received were made by the treasurer personally; and the charges for such moneys were entered against him, and all vouchers for payments were taken in the treasurer's name, and he received credit for such payment. The name or intervention of the clerk did not appear in any of the books, vouchers, or accounts, either in the mint or in the accounting department at Washington, with which it corresponded.

"At the end of the year 1847, it was ascertained that a large sum of money was missing from the contingent fund; and the prisoner, having been arrested, was indicted for embezzlement under the acts of congress of 13th August, 1841, and 7th August, 1846. He was tried in the district court and found guilty.

"I had serious doubts while the case was before the jury, whether it fell properly within the provisions of the acts of congress; and as the question was of the first importance, I was desirous that it should be discussed more fully than it could be at bar. I therefore charged against the prisoner upon the several points of law, announcing my purpose, as the case was one in which the circuit and district court have concurrent jurisdiction, to solicit the advice and aid of Judge Grier upon the hearing of a rule for new trial, if the verdict should make such a rule proper.

"He acceded to my wish, and the whole subject has been revised before us by the district attorney and the counsel for the prisoner in the most ample manner. The result is an unhesitating concurrence of opinion between my learned brother and myself, that the verdict cannot stand. We regard the history and spirit of these acts of congress, as well as their phraseology, altogether conclusive upon the question.

(461) *Against same person for same, charging him with being a person employed at the mint.*

That R. H., etc., on, etc., at, etc., then and there being a person employed at the mint of the United States, with force and

“ At the common law, the party who by the confidence of another is intrusted with the possession of his property, cannot commit the crime of larceny by appropriating it to his own use. The fiduciary character of the delinquent forms his defence, for the criminal law, until it was modified by statute, took no cognizance of breaches of trust.

“ At the same time, it distinguished between the *legal possession* of property, such as the very existence of a trust implies, and that mere *charge or supervision*, which is devolved on a servant or clerk. The servant having a *bare charge*, to use the words of the law, became guilty of theft by a fraudulent conversion.

“ Thus, on the one hand, a butler who had charge of his master's plate, the shepherd who watched over his sheep, and the shop-boy who attended behind his counter, might be convicted of larceny, if they converted to their own use their master's property. While, on the other hand, the attorney who pillaged his principal, the guardian who defrauded his ward, and the officer who embezzled public moneys, which the law had confided to him, were not answerable as for crime.

“ The United States courts have no common law jurisdiction; that is to say, they derive their only power to try, convict, or punish, from the constitution, and the laws made in pursuance of it. The jurisdiction of offences which are cognizable at common law resides in the state courts alone, even though the general government may be the party immediately aggrieved by the misdeed complained of.

“ Until the year 1840, the congress of the United States seems to have been, in general, content with the protection which the laws of the several states gave to the public property within their limits. The integrity of subordinates, who were not themselves intrusted with public money, though they might from their position have a certain charge or custody of it, was guarded of course by the common law and the local statutes, as administered by the state courts. Under these, such a subordinate, whether called by the name of watchman, servant, clerk, or assistant, might be punished criminally for a fraudulent conversion to his own use of the moneys of the general government. But the higher officers, the heads of departments, the treasurers of the United States and of the mint, the collectors of customs, land officers, and others, depositaries of important public trusts, though required in some instances to give security for their official fidelity, were punishable only by impeachment before the senate of the United States.

“ Several very large defaults having occurred, however, on the part of important public officers of the revenue, it was thought necessary to protect the treasury by additional safeguards. On the 4th of July, 1840, an act of congress was passed ‘to provide for the collection, safe-keeping, transfer, and disbursement of the public revenue.’ This act created and defined the crime of embezzlement, and made it applicable to all those officers who were charged by the provisions of the act itself with the ‘safe-keeping, transfer, or disbursements of public moneys.’ As to all others, officers as well as servants or clerks, except those connected with the post-office (to whom it was specially extended), it left the law unchanged.

“ The act of 1840 was repealed on the 13th of August of the following year, but the provisions respecting embezzlements were re-enacted in a slightly modified form, so as to include among those who might become subject to its penal-

arms, unlawfully and feloniously did embezzle certain coins of gold, which had been struck and coined at the said mint, to wit,

ties, all '*officers charged* with the safe-keeping, transfer, or disbursement of the public moneys, or connected with the post-office department. But as to all but *officers* so charged, it left the law as it stood before the year 1840.

"The act of 1846 followed. This substantially reconstituted the treasury system which had been rescinded in 1841, but made further provision also for the punishment of embezzling. Its terms are somewhat broader, perhaps, than those of the two preceding acts, for they apply to 'all officers and other persons *charged* by this act or any other act with the safe-keeping, transfer, and disbursement of public moneys.' But its spirit and objects are the same; and the detailed provisions of its several sections have obvious reference to persons intrusted by some act of congress with the legal possession of public money, not to those subordinates, who, not having been intrusted with such possession, could be punished for a fraudulent conversion, as felons, without any congressional legislation. The act throughout applies not to clerks, workmen, or other servants, but to the legally authorized *custodiers* of public moneys, the '*fiscal agents*' recognized as such at the treasury of the United States, charged there with receipts, and credited with disbursements; in a word, to officers or agents '*intrusted*' by law or under law with the possession of public money, and bound to account for it.

"The duties which it enjoins, the safeguards and checks which it creates, the direct accountability which it prescribes and enforces, the evidence it appeals to as establishing the fact of delinquency—even the allowance it makes for certain official expenses—all together stamp on it this limited character. Thus it requires of the officer that he shall keep an accurate entry of each sum that he receives, and each payment or transfer that he makes; obviously with reference to the account he is to render of his receipts and disbursements at the treasury department; it makes him punishable if he transmits to the treasurer a false voucher, or a voucher that does not truly represent a payment actually made; a transcript from the treasury books showing a balance against him is made sufficient evidence of his indebtedness; 'a draft, warrant, or order, drawn by the treasury department upon him,' and not paid, is the primary proof of his embezzlement; and provision is made for the necessary clerk hire, and other expenses of a large class, at least of the officers included within its terms.

"It needs no argument to show that these enactments are without just application to a person who is merely a clerk himself, who is unknown to the treasury department, who is neither charged nor credited with public moneys there or elsewhere, who transmits no vouchers, because he renders no account, against whom, therefore, no treasury transcript can ever be produced, on whom no treasury draft, warrant, or order can be drawn under any circumstances, and to whom neither the act of 1846 nor any other act has ever intrusted public moneys, either personally or by official designation.

"The prisoner was such a person. In point of fact he was never in legal possession of the moneys he has abstracted. They were moneys of the United States, in which he had no special or qualified property, which had been intrusted to the safe-keeping of the treasurer of the mint by the express language of an act of congress, and which could not be withdrawn from his legal custody and charge except by warrant of an appropriate officer in the form designated by law.

"We do not understand that the prescription of the clerk's duties by the director was intended, or supposed, to interfere with this official charge of the treasurer. Had it been so, there would have been some record, some book entry, some memorandum at least in the mint, showing the character if not the amount of liabilities, from which the treasurer could claim to be relieved by the clerk's assumption of them. There would have been some recognition of the fact at the treasury in Washington, if the clerk had been constituted a receiving, safe-keeping, or disbursing officer; he would have been called on, as by law all such offi-

(*stating the coins*), * the said coins of gold and the said coins of silver and the said coins of copper being, at the time of the committing of the felony aforesaid, the property of the United States of America, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That, etc., the said R. H., then and there being a person employed at the mint of the United States, to wit, a clerk of the said mint for the treasurer of the said mint, with force and arms, unlawfully and feloniously did embezzle certain other coins of gold, struck and coined at the said mint, to wit (*stating the coins, and concluding as in first count from **).

(*For final count, see supra, 17, 18, 181, n., 239, n.*)

(462) *Against auctioneer for embezzlement, under Mass. Rev. Sts. ch. 126, § 30.(c)*

That T. S., etc., on, etc., at, etc., solicited employment as an auctioneer of and for E. G., of said Boston, merchant, and in

cers are called on, to render his accounts, to declare from time time what moneys he had received, to exhibit vouchers for his disbursements, and thus to define the extent of his liabilities to the United States.

"But whatever may have been the terms, or the usage, or the understanding which proposed to set forth the prisoner's duties as a clerk, they could not absolve the treasurer from that legal custody with which the act of congress and his commission had invested him. The clerk's possession, whatever it was, was in law the possession of the treasurer; and the clerk's liabilities, therefore, upon the facts found by the jury, are those of a servant merely, not of a person either 'charged' or 'intrusted by law,' with the safe-keeping, transfer, or disbursement of the public moneys.

"The case is one to which the statute does not extend, and the rule must therefore be made absolute."

The indictments in the text were prepared by Mr. Pettit, the U. S. district attorney in Philadelphia.

(c) *Com. v. Stearns*, 2 Met. 343. Dewey, J.: "The questions raised in the present case require a construction of the Rev. Sts. ch. 136, § 29, and are of no inconsiderable importance in their consequences, in marking the distinction between those acts which are to be denominated as felonies, punishable by ignominious punishments, and those defaults in the payment of money or in the discharge of contracts, for which, however unjustifiable, the law authorizes no other mode of redress than a civil action by the party aggrieved.

"The principles of the common law not being found adequate to protect general owners against the fraudulent conversion of property by persons standing in a certain fiduciary relation to those who were the subjects of their peculations, certain statutes have been enacted, as well in England as in this commonwealth, creating new criminal offences and annexing to them their proper punishments. The consequence is, therefore, that many acts which formerly

consideration that said G. would employ him as his agent for the sale of cotton goods, undertook and engaged to serve said G. as his agent in that employment, and stipulated to pay over to said G., promptly and without delay, the cash proceeds of said cotton goods, at eight cents per yard, which said S. should sell for him at public auction; and afterwards, at said Boston, said G. delivered to and intrusted to said S., in said employment as his agent, sundry, to wit, four, bales of cotton goods, to be sold as aforesaid, and the cash proceeds thereof, at eight cents for each yard, to be promptly paid by said S. to said G., and within three days after the sale of each of said bales of goods, and by virtue of said employment, and as agent of said G. as aforesaid, said S. took and received said goods, and sold the same for cash, and received in payment therefor the money and price and proceeds thereof, to wit, the sum of two hundred and

were denominated mere breaches of trust, and subjected the party to a civil action only, have now become cognizable before our criminal courts as offences against the commonwealth. The statutes necessarily require a careful discrimination in their application to the various cases that may arise, and it may be found somewhat difficult to mark out, with entire precision, the line of discrimination between the acts punishable as crimes under these statutes, and those that may not be embraced by them, while they may yet present strong cases of breach of good faith and violation of the confidence reposed in the party guilty of the breach of trust.

"The court have, therefore, very carefully considered the facts disclosed in the case now before us, and the result to which we have arrived will be stated, after disposing of a preliminary objection that was suggested by the counsel for the defendant, though apparently not much relied on.

"This objection was, that it is necessary, in order to bring the offence within the Rev. Sts. ch. 126, § 29, that the property embezzled should belong to some other person than the master or principal, whose servant or agent is charged with the embezzlement; inasmuch as the statute provides, that, 'if any clerk, agent, or servant, etc., shall embezzle or fraudulently convert to his own use, without the consent of his employer or master, *any money or property of another,*' etc.

"A similar objection appears to have been overruled by the supreme court of the state of New York, in an indictment on the revised statutes of that state, vol. 2, p. 678, § 59; a statute from which ours seems substantially to have been framed. The words there used are, 'belonging to any other person;' but the court held that these words, as used in the statute, meant any other person than he who is guilty of embezzlement. *People v. Hennessey*, 15 Wend. 147. A different construction from this would be inconsistent with the earlier course of legislation on this subject (see stat. 1834, ch. 186), and would leave unprovided for all cases of embezzlement, by servants or agents, of the property of their masters or their principals. We are of opinion that that offence, made punishable by the revised statutes of this commonwealth, ch. 126, § 29, was not intended to be restricted in the manner suggested by the counsel for the defendant, but may properly be held to embrace cases of embezzlement, by servants or agents, of the property of their masters or principals."

seventy-two dollars, which money and proceeds of said goods came into the hands and possession of said S. by virtue of said employment, and as the agent and servant of said G., under the trust and agreement aforesaid; and the jurors, etc., on their oaths aforesaid, do further present, that the said T. S., afterwards, to wit, on, etc., at, etc., then and there having in his possession the said money and proceeds of said goods sold by him for said G., the same money and proceeds being the property and money of said G., in the hands of said S., as his agent and servant as aforesaid, and which same money and proceeds came into the hands and possession of said S. by virtue of his employment as agent of said G., and of the trust aforesaid, to wit, the sum of two hundred and seventy-two dollars, he the said S. then and there unlawfully and fraudulently embezzled and converted the same to his own use, and took and secreted the same with intent to embezzle and convert the same to his own use, without consent of said G., his said employer, the same being the money and property of said G., which came to the possession of said S., and was under his care by virtue of said employment; and by said embezzlement, conversion, and secret-
ing of the same money and property as aforesaid, and by force of the statute in such case made and provided, said S. is deemed to have committed the crime of simple larceny.

(463) *Second count. Larceny.*

That said S., on, etc., at, etc., the same money and proceeds aforesaid, of the proper money and property of said G., in his possession as aforesaid, feloniously did steal, take, and carry away, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

[*For indictment against factor for converting principal's fund to his own use, etc., under Pennsylvania statute, see post, 519.*]

(464) *General form of indictment in New York.*

That A. B., etc., on, etc., at, etc., was employed in the capacity of a clerk and servant to one C. D., and as such clerk and servant was intrusted to receive, etc. (*stating the nature of the trust*), and being so employed and intrusted as aforesaid, the said A. B., by virtue of such employment, then and there did receive

and take into his possession (*stating the subject of the embezzlement*), for and on account of, etc., his said master and employer; and that the said A. B., on the day and year last aforesaid, with force and arms, at the ward, city, and county aforesaid, fraudulently and feloniously did take, make way with, and secrete, and did embezzle and convert to his own use, without the assent of the said C. D., his master and employer, the said, etc., of the goods, chattels, personal property, and money of the said C. D., which said goods, chattels, personal property, and money had come into his possession, and under his care, by virtue of his being such clerk and servant as aforesaid, to the great damage of the said C. D., etc. (*Conclude as in book 1, chapter 3.*)

(465) *Second count. Larceny.*

That the said A. B., on, etc., at, etc., of the goods, chattels, and personal property of one C. D., then and there being found, feloniously did steal, take, and carry away, to the great damage of the said C. D., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)(*d*)

(*d*) In *State v. Butler*, 26 Minn. 90, we have the following opinion from Perry, J.: So much of the indictment as is important in considering the points made by the defendant is as follows: "Chauncy Butler is accused, by the grand jury . . . of the crime of larceny, committed as follows: That the said Chauncy Butler did wrongfully . . . and feloniously embezzle, and fraudulently convert to his own use the moneys of J. S. Rowell, Theodore Rowell, S. W. Rowell, and Ira Rowell, copartners as J. S. Rowell, Sons & Company, which said moneys were then in the sum and of the value of sixty-eight dollars and fifty cents, and were then and there the moneys and personal property of the said J. S. Rowell" [names as before], "but a more particular description of which said moneys, or of the kind, character, number, or denomination of the same, or any of the same, is to the grand jury unknown; that the moneys so as aforesaid by the said Chauncy Butler . . . embezzled and fraudulently converted . . . were then and there received and collected by the said Chauncy Butler from one F. Brandt, in payment of a certain promissory note, in writing, for the payment of money, made and executed by the said F. Brandt, then and there the personal property of, and belonging to the said J. S. Rowell" [names as before], "which said note had, theretofore, by the said J. S. Rowell" [names as before] "been entrusted and placed and came for collection into the hands of the said Chauncy Butler, and upon collection thereof, the moneys collected thereon to be by him, the said Chauncy Butler, remitted and paid to said J. S. Rowell" [names as before]; "and the said Chauncy Butler being then a person over the age of sixteen years, and not an apprentice; and such embezzlement and conversion of said moneys being done and committed by him, the said Chauncy Butler, without the consent and against the will of the said J. S. Rowell" [names as before]. "And so the grand jury do say that . . . the moneys of said J. S. Rowell" [names as before], "of value, to wit of the value of sixty-eight dollars and fifty cents, then and there the moneys and perso-

(465a) *Against cashier of national bank for embezzlement.*

The jurors for, etc., upon their oath present, that heretofore, to wit, on, etc., there was, at, etc., a certain national banking association, to wit, etc., theretofore duly organized and established, and then existing and doing business, at, etc., aforesaid, under the laws of the said United States, and R. B. C. was then and there cashier and agent of the said association, and as such cashier and agent then and there had and received in and

nal property of the said J. S. Rowell' [names as before], "the said Chauncy Butler did wrongfully, unlawfully, and feloniously take, steal, and carry away, contrary to the form of the statute in such case made and provided," etc.

"Defendant's first objection to the indictment is that 'it is uncertain as regards the particular circumstances of the offences charged,' and that 'it is impossible to gather from the indictment any distinctive charge.' While the indictment cannot be said to be very neatly framed, we think it is sufficient. It, in effect, charges that the defendant had committed the crime of larceny, by embezzling and fraudulently converting to his own use the sum of sixty-eight dollars and fifty cents, in money, which he had collected of one F. Brandt for the partnership firm of J. S. Rowell, Sons & Company, in payment of a promissory note executed by said Brandt, which was the property of said firm, by which it had been placed in the defendant's hands to be by him collected, the moneys collected thereon to be by him paid over to said firm. The embezzlement and fraudulent conversion are also charged to have been without the consent of the firm. It seems to us that this is a certain and distinct charge of an offence described in Laws, 1876, c. 55 (Gen. St. 1878, c. 95, § 33), which, among other things, provides that if a person who receives or collects money, for the use of and belonging to another, embezzles or fraudulently converts said money to his own use, without the consent of the owner of said money, he shall be deemed to have committed larceny. An indictment for such embezzlement and fraudulent conversion properly accuses the person indicted of the crime of larceny. *State v. New*, 22 Minn. 76.

"The other objection to the indictment is that the maker of the note and some of the members of the firm, as well as the firm itself, are designated by the initials only of their Christian names. As respects the name of the maker of the note, there is nothing to show, and no presumption, that the note is signed otherwise than with the initial of his Christian name, just as is alleged in the indictment. Certainly it must be sufficient to describe the signature of the note according to the fact, and also sufficient to allege that it was collected of the person bearing the name by which the note is signed. With regard to the name of the firm there is nothing to show, and no presumption, that the name 'J. S. Rowell, Sons & Company' is not the firm name and the whole of it. The note was the property of the firm, and the important thing, therefore, was, that the firm should be correctly designated by its firm name. What the law requires is that the particular offence charged shall be described with sufficient certainty to identify it. Both with regard to the maker of the note, and the name of the firm, there can be no doubt that the offence charged in this case is, upon the face of the indictment, sufficiently identified, not only to inform the defendant of what he is accused, but to describe and distinguish it from other offences. See also Gen. St. c. 108, § 8, and *State v. Boylson*, 3 Minn. 325 (438).

"We think the defendant's objections to the indictment are untenable, and that the indictment is sufficient."

into his possession certain of the moneys, funds, and credits of said association, to wit, certain United States treasury notes of great value, to wit, of the value of five hundred dollars, certain national bank notes of great value, to wit, of the value of five hundred dollars, and certain checks, to wit, bank checks of great value, to wit, of the value of nine thousand dollars, a more particular description of which said treasury notes, national notes, and checks, the said jurors, etc., have not and cannot give; and the said treasury notes, bank notes, and checks, then and there being the property of said banking association, of great value aforesaid, and then and there being in the possession of said C., as such cashier and agent as aforesaid, he the said C. did then and there, at, etc., on, etc., unlawfully, with intent to defraud said banking association, embezzle, abstract, and wilfully misapply, and convert to his said C.'s own use, against the peace, etc. (*Conclude as in book 1, chapter 3.*)

(Second count like the first with slight variation in statement.

Third, fourth, fifth, sixth, seventh, and eighth counts charge embezzlement of particular checks set out in each count according to their tenor.

Ninth count charges the embezzlement of treasury notes, bank notes, and coin in statements similar to those of the first count.)

Tenth count.

The jurors, etc., present, that heretofore, to wit, on, etc., there was at, etc., a certain banking association, to wit, etc., theretofore duly organized and established, and then existing and doing business under the laws of the United States relating to national banks, and R. B. C. was then and there cashier and agent of said association, and did then and there, without authority from the directors of said association, and with intent of him, the said C., then and there to defraud said association, draw a certain order, and bill of exchange of the tenor following (*setting out the bill of exchange*), and the said E. national bank of, etc., at the time of drawing said order and bill of exchange as aforesaid, had directors and a board of directors, and long prior thereto had directors and a board of directors,

all of which said C. then and there well knew, against the peace, etc.(e) (*Conclude as in book 1, chapter 3.*)

(466) *Against the president and cashier of a bank for an embezzlement. Rev. Sts. of Mass. ch. 126, § 27.(f)*

That William Wyman, late of Charlestown, in the county of Middlesex, gentleman, and Thomas Brown the younger of that name, of the same place, gentleman, at Charlestown aforesaid, in the county aforesaid, on the first day of April, in the year of our Lord the said Wyman then and there being one of the directors and president of the Phoenix Bank, a corporation then and there duly and legally established, organized, and existing under and by virtue of the laws of the said commonwealth, as an incorporated bank, and the said Brown being then and there cashier of the said bank, did, by virtue of their said respective offices and employments, and whilst the said Wyman and Brown were severally employed in their said respective offices, have, receive, and take into their possession certain money to a large amount, to wit, to the amount and sum of two hundred and twenty thousand dollars, and of the value of two hundred and twenty thousand dollars, divers bills, called bank bills, amounting in the whole to the sum of one hundred and twenty thou-

(e) This was the indictment in *U. S. v. Conant*, U. S. Cir. Ct., Boston, 1879. The defendant's conviction was sustained.

(f) *Com. v. Wyman*, 8 Metcalf, 247. The indictment in this case, say Messrs. Train & Heard, was founded on the Rev. Sts. of Mass. ch. 133, § 10, which enact, that "In any prosecution for the offence of embezzling the money, bank notes, checks, drafts, bills of exchange, or other securities for money, of any person, by a clerk, agent, or servant of such person, it shall be sufficient to allege generally, in the indictment, an embezzlement of money to a certain amount, without specifying any particulars of such embezzlement, and on the trial, evidence may be given of any such embezzlement, committed within six months next after the time stated in the indictment; and it shall be sufficient to maintain the charge in the indictment, and shall not be deemed a variance, if it shall be proved that any money, bank note, check, draft, bill of exchange, or other security for money, of such person, of whatever amount, was fraudulently embezzled by such clerk, agent, or servant, within the said period of six months." In *Com. v. Wyman* it was held, that this section did not include bank officers, and that a bank officer, when accused of embezzlement, must be charged with a specific act of fraud, as in larceny at common law, and be proved guilty of the specific offence charged, and that not more than one offence could be alleged in one count of the indictment. But by Stat. 1856, ch. 215, the provisions of this section are extended to all prosecutions of a similar nature, against presidents, directors, cashiers, and other officers of banks.

sand dollars, and of the value of one hundred and twenty thousand dollars, divers notes, called treasury notes, amounting in the whole to the sum of seventy-five thousand dollars, and of the value of seventy five thousand dollars, of the goods and chattels, property, and moneys of the said president, directors, and company of the Phœnix Bank,(g) in their banking-house there situate, being; and the said money, bills, and notes, then and there unlawfully, fraudulently, and feloniously did embezzle, in the banking-house aforesaid. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Wyman and Brown then and there, in manner and form aforesaid, the aforesaid money, bills, and notes, of the goods, chattels, property, and moneys of the said president, directors, and company of the Phœnix Bank, feloniously did steal, take, and carry away, in the banking-house aforesaid; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(467) *Against a clerk for embezzlement.* *Rev. Sts. of Mass. ch. 126,*
§ 29.(h)

That C. D., late of B., in the county of S., trader, on the first day of June, in the year of our Lord at B., in the county

(g) The ownership may be laid in the person having the actual or constructive possession, or the general or special property in the whole, or in any part of the property. *Rev. Sts. of Mass. ch. 133, § 11; Com. v. Harney, 10 Metcalf, 426; Tr. & H. Prec. 188.*

(h) *Tr. & H. Prec. 189.* In Massachusetts, say Messrs. Train & Heard, it has been held, that there are a certain class of cases which do not come within the statute. Thus, in *Com. v. Libbey, 11 Metcalf, 64*, that a person who is employed to collect bills for the proprietors of a newspaper establishment, and converts to his own use the money which he collects for them, is not such an agent or servant as is intended by section twenty-nine. In this case, Dewey, J., said: "In the case of a domestic servant, and to some extent, in the case of a special agency, the right of property and the possession continue in the principal, and a disposal of the property would be a violation of the trust, and an act of embezzlement. But cases of commission merchants, auctioneers, and attorneys authorized to collect demands, stand upon a different footing; and a failure to pay over the balance due to their employers, upon their collections, will not, under the ordinary circumstances attending such agency, subject them to the heavy penalties consequent upon a conviction of the crime of embezzlement." And in *Com. v. Stearns, 2 Metcalf, 343*, it was held that an auctioneer, who receives money on the sale of his employer's goods, and does not pay it over, but misapplies it, is not such an agent or servant as is intended by the statute; whether he receives the goods for sale in the usual mode, or receives them on an agreement to pay a certain sum therefor, within a specified time after the sale. See *The People v. Allen, 5 Denio, 76*. By "the money or property of another," in the statute, is meant the money or property of any person except such agent,

of S., being then and there the clerk of one J. N., the said C. D. not being then and there an apprentice to the said J. N., nor a person under the age of sixteen years, did then and there, by virtue of his said employment, have, receive, and take into his possession certain money, to a large amount, to wit, to the amount of one thousand dollars, and of the value of one thousand dollars, of the property and moneys of the said J. N., the said C. D.'s said employer, and the said C. D. the said money then and there feloniously did embezzle, and fraudulently convert to his own use, without the consent of the said J. N., the said C. D.'s employer; whereby, and by force of the statute in such case made and provided, the said C. D. is deemed to have committed the crime of simple larceny. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. then and there, in manner and form aforesaid, the said money of the property and moneys of the said J. N., the said C. D.'s said employer, from the said J. N. feloniously did steal, take, and carry away; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(467a) *Another form, under Mass. Gen. Stat. ch. 161, § 42.*

That J. N., etc., on, etc., at, etc., being then and there the clerk, servant, and agent of G. G. P. and E. W. W., said P. and W. then and there being copartners in business (the said B. not being then and there an apprentice to the said P. and W., or to either of them, and not being then and there a person under the age of sixteen years), did then and there, by virtue of his said employment, have, receive, and take into his possession certain money to the amount and of the value of twenty-five thousand dollars, of the said P. and W., as such copartners, the said employers of the said B.; and that the said B., the said money so by him had, received, and possessed, then and there feloniously did embezzle and fraudulently convert to his own use, without the consent of the said employers, or either of them; whereby, and by force of the statute in such case made and provided, the

clerk, or servant who embezzles it. A different construction would leave unprovided for all cases of embezzlement, by servants or agents, of the property of their masters or their principals. *Com. v. Stearns*, 2 Metc. 343. See also *The People v. Hennessey*, 11 Wendell, 147.

said B. is deemed to have committed the crime of simple larceny. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said B. then and there, in manner and form aforesaid, the said money, of the property and moneys of the said P. and W., feloniously did steal, take, and carry away, against the law, etc.(i) (*Conclude as in book 1, chapter 3.*)

(468) *Against a carrier for embezzlement. Rev. Sts. of Mass. ch. 126, § 30.(j)*

That one J. N., on the first day of June, in the year of our Lord at F., in the county of M., did deliver to one J. S., late of, etc., the said J. S. being then and there a carrier, a certain large sum of money, to wit, the sum of one thousand dollars, and of the value of one thousand dollars, of the property and moneys of the said J. N., to be carried by the said J. S., for hire, to wit, for the sum of two dollars, and to be delivered by the said J. S., for the said J. N., and by the said J. N. sent and directed to one C. D., at B., in the county of S.; and that the said J. S. did, by virtue of his said employment as a carrier, at F. aforesaid, in the county aforesaid, and while he was so employed as aforesaid, take into his possession said money to be carried and delivered as aforesaid, and that the said J. S., carrier as aforesaid, afterwards, to wit, on the first day of June, in the year of our Lord at F., in the county of M., and before the money so delivered to him as aforesaid was by the said J. S. delivered to the said C. D. at B., in the county of S., feloniously did embezzle and fraudulently convert the same to his own use; whereby, and by force of the statute in such case made and provided, the said J. S. is deemed to have committed the crime of simple larceny. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the said first day of June, in the year of our Lord at F., in the county of M., in manner and form aforesaid, the said money, the property of the said J. N., from the said J. N. feloniously did steal, take,

(i) Sustained in *Com. v. Bennett*, 118 Mass. 443.

(j) *Tr. & Heard Prec.* 191. Under the statute of Maine, if a person, to whom property is intrusted in Maine to be carried for hire, and delivered in another state, shall, before such delivery, fraudulently convert the same to his own use, the crime is punishable in Maine, whether the act of conversion be in that state or another. *State v. Haskell*, 33 Me. 127.

and carry away, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(468a) *Against bailee for embezzlement under Mass. Gen. statute.*

That B. (the defendant) on, etc., did embezzle and fraudulently convert to his own use, divers promissory notes, payable to the bearer on demand, current as money in said commonwealth, of the amount and of the value of sixty-five dollars, a more particular description of which is to the jurors unknown, of the property, moneys, goods, and chattels of one H. S., the said promissory notes being then and there the subject of larceny, and the said promissory notes having theretofore, to wit, on, etc., been there delivered to the said B. by the said S., in the trust and confidence and with the direction that the said B. would and should return said promissory notes to the said S., upon demand, and the said promissory notes and each thereof having been then and there received by the said B. in the said trust and confidence and with the said direction.(k) (*Conclude as in book 1, chapter 3.*)

(469) *Embezzlement by clerk or servant, in England.(l)*

That J. S., etc., on, etc., at, etc., being then and there employed as clerk ("clerk or servant, or any person employed for that purpose, or in the capacity of a clerk or servant"), to J. N., did, by virtue of his said employment, then and there, and whilst he

(k) On the trial of the above indictment, it appearing by the evidence that the notes were of the amount and value of \$70, and were known so to be by the grand jury, this was held no variance. It was held also, that the indictment was not bad for failure to aver that the goods were to be returned upon the demand of H. S., or that H. S. did demand them. *Com. v. Hussey*, 111 Mass. 432.

(l) Archbold's C. P. 5th Am. ed. 329.

This form is drawn upon the statutes 7 & 8 Geo. IV. c. 29, s. 47, which, for the punishment of embezzlements committed by clerks or servants, declares and enacts, that if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattel, money, or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security was not received into the possession of such master otherwise than by the actual possession of his clerk, servant, or other person so employed; and every such offender, being convicted thereof, shall be liable at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

was so employed as aforesaid, receive and take into his possession certain money ("chattel, money, or valuable security"),^(m) to a large amount, to wit, to the amount of ten pounds, for and in the name and on the account of the said J. N., his master, and the said money then and there fraudulently and feloniously did embezzle; and so the jurors, etc., do say, that the said J. S., on, etc., at, etc., then and there, in manner and form aforesaid, the said money, the property of the said J. N., his said master, from the said J. N. feloniously did steal, take, and carry away, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(If the prisoner has been guilty of other acts of embezzlement within the period of six months, add the following):

That the said J. S., on, etc., at, etc., afterwards, and within six calendar months from the time of the committing of the said offence in the first count of this indictment charged and stated, to wit, on the day of in the year aforesaid, at the parish aforesaid, in the county aforesaid, being then and there employed as clerk to the said J. N., did, by virtue of such last mentioned employment, then and there, and whilst he was so employed as last aforesaid, receive and take into his possession certain other money to a large amount, to wit, to the amount of ten pounds, for and in the name and on the account of the said J. N., his said master, and the said last mentioned money then and there, within the said six calendar months, fraudulently and feloniously did embezzle, and so, etc. (*as in the first count to the end*).

(469a) *Another form.*

That J. S., late, etc., on, etc., at, etc., was clerk (or servant) to J. N., of, etc. (*or was employed by J. N.*), and that the said J. S., whilst he was such clerk (*or servant*) to the said J. N. as aforesaid (*or was so employed by the said J. N. as aforesaid*), to wit, on the day and year aforesaid, certain money to the amount of ten pounds (*describing articles*), belonging to the said J. N. his master (*or employer, varying with statute*), feloniously did steal, take, and carry away, against, etc.⁽ⁿ⁾ (*Conclude as in book 1, chapter 3.*)

^(m) See 7 & 8 Geo. IV. c. 29, s. 5.

⁽ⁿ⁾ Arch. C. P. 19th ed. p. 383.

(469b) *Another form under 24 and 25 Vict., c. 96.*

That J. S., on, etc., at, etc., being then employed as clerk (or servant) to J. N., did then, and whilst he was so employed as aforesaid, receive and take into his possession certain money to a large amount, to wit, etc., for and in the name and on the account of the said J. N. his master (or employer), and the said money then (and there) fraudulently and feloniously did embezzle; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., then, in manner and form aforesaid, the said money, the property of the said J. N. his said master (or employer), feloniously did steal, take, and carry away, against, etc.(o) (*Conclude as in book 1, chapter 3.*)

(469c) *Against banker under English statute for conversion of money given him for specific purposes.*

That, on, etc., at, etc., J. N. did intrust J. S. as a banker (or broker or other agent) with a certain large sum of money, to wit, etc., with a direction to the said J. S. in writing, to pay the said sum of money to a certain person specified in the said direction; and that the said J. S., banker as aforesaid, afterwards, to wit, etc., in violation of good faith, and contrary to the terms of the said direction, unlawfully did convert to his own use and benefit the said sum of money, so to him intrusted as aforesaid, against, etc.(p) (*Conclude as in book 1, chapter 3.*)

(469d) *Against banker for misappropriating goods given him for safe-keeping.*

(*Commencement as in last precedent*)—J. N. did intrust to J. S. as a banker for safe custody, a promissory note (*stating chattel or other security*) of one J. P., for the payment of without any authority to him the said J. S. to sell, negotiate, transfer, or

(o) Arch. C. P. 19th ed. p. 482. Under recent statutes "money" is a sufficient designation. It was otherwise previously. *R. v. Furneaux*, R. & R. 335; *R. v. Tyers*, R. & R. 402. But "money" is not sustained by proof of a check. *R. v. Keena*, L. R. 1 C. C. 113. The property must be averred to be in the master. *R. v. McGregor*, 3 B. & P. 106; R. & R. 23; *R. v. Beacall*, 1 Mood. C. C. 15. It is not necessary to prove from whom the money was received. *R. v. Beacall*, 1 C. & P. 454. It must appear that the defendant was servant at the time. *R. v. Somerton*, 7 B. & C. 463.

(p) Arch. C. P. 19th ed. p. 500; citing *R. v. Golde*, 2 M. & Rob. 425.

pledge the said promissory note; and that the said J. S., banker as aforesaid, at, etc., on, etc., in violation of good faith, and contrary to the object and purpose for which such promissory note was intrusted to him the said J. S. as aforesaid, unlawfully did negotiate and convert to his own use and benefit the said promissory note, against, etc.(q) (*Conclude as in book 1, chapter 3.*)

(469e) *Against factor under English statute.*

That, etc., J. N. did intrust to J. S., the said J. S. then being a factor and agent of him the said J. N., ten bales of cotton (of the value of); and that the said J. S., factor and agent as aforesaid, at, etc., on, etc., contrary to and without the authority of the said J. N., for his own use and benefit, and in violation of good faith, unlawfully did make a deposit of the said ten bales of cotton with one J. P., as and by way of a pledge, lien, and security for a certain sum of money, to wit, the sum of ten pounds, then advanced by the said J. P. to him the said J. S., against, etc.(r) (*Conclude as in book 1, chapter 3.*)

(469f) *Against trustee under English statute.*

That, before and at the time of the committing of the offences hereinafter mentioned, to wit, on, etc., at, etc., J. S. was a trustee of certain property, to wit (*stating property*), wholly (*or partially*) for the benefit of J. N.; and that he, the said J. S., so being such trustee as aforesaid, on, etc., at, etc., unlawfully and wilfully did convert and appropriate the said property to his own use, with intent thereby then to defraud (the said), against, etc.(s) (*Conclude as in book 1, chapter 3.*)

(469g) *Against directors of public company under English statute.*

That, before and at the time of the committing of the offence hereinafter mentioned, J. S. was a director (*or member, or public officer*) of a certain public company (*or body corporate*) called, etc.; and that he the said J. S., so being director as aforesaid, on, etc., at, etc., did unlawfully and fraudulently take and apply

(q) Arch. C. P. 19th ed. p. 502; citing *R. v. Tatlock*, 2 Q. B. D. 15; *R. v. Cooper*, L. R. 2 C. C. 123.

(r) Arch. C. P. 19th ed. p. 503.

(s) Arch. C. P. 19th ed. p. 505, where it is advised that counts be added alleging that the defendant disposed of the property, or destroyed it.

for his own use and benefit certain money, to wit (*specifying*), of and belonging to the said company, against, etc.(t) (*Conclude as in book 1, chapter 3.*)

(469h) *Against same for publishing fraudulent statements.*

(*Commencement as in last form*)—did unlawfully circulate and publish a certain written statement and account which said written statement and account was false in certain material particulars, that is to say, in this, to wit, that it was therein falsely stated that (*state the particulars*), he the said J. S. then well knowing the said written statement and account to be false in the several particulars aforesaid; with intent thereby to deceive and defraud J. N., then and there being a shareholder of the said public company, against, etc.(u) *Conclude as in book 1, chapter 3.*)

(469i) *Embezzlement by partner under English statute.*

That J. S., etc., being a member of a certain copartnership of persons trading under the name, style, and title of the A. S. and P. C. Soc., did, on, etc., receive into his possession the sum of one pound and one shilling in money, for and on the account of the said copartnership, and fraudulently and feloniously did embezzle the said sum of money. (*Conclude as in book 1, chapter 3.*)

The second count charged him with having within six months from the offence in the first count, that is to say, on, etc., while he was a member of the said copartnership, received on account of the said copartnership the further sum of £1 7s., and with having embezzled that sum.

The third count charged him with having within six months from the offences in the first and second counts, that is to say, on, etc., while he was a member of the said copartnership, received on account of the said copartnership the further sum of £1 5s., and having embezzled that sum.(v)

(t) Arch. C. P. 19th ed. p. 509.

(u) Arch. C. P. 19th ed. p. 510. It is advised that counts be added stating the intent to be to deceive and defraud "certain persons to the jurors aforesaid unknown, being shareholders of the said," etc.; and also further varying this intent.

(v) R. v. Balls, 12 Cox C. C. 96; L. R. 1 C. C. 328. In this case evidence was given that during a certain week payments of ten smaller sums, making together £1 1s., had been made to defendant, and that he failed to account for

(469j) *Embezzlement under English statute, by constable, etc.*

That the prisoner, on, etc., being then employed in the public service of the queen, and being a constable and a person employed in the police force of the borough of L., and entrusted by virtue of such employment with the receipt and custody of money the property of the queen, did, by virtue of his said employment, and whilst he was so employed, receive and have in his possession and was entrusted with certain money the property of the queen, to wit, to the amount of one pound and six shillings, for and on account of the public service of the queen, and then fraudulently and feloniously did apply the said money to his own use and benefit, and fraudulently and feloniously did steal the said last mentioned money, being the property of the queen, from the queen, against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That prisoner afterwards, and within six calendar months of his committing the offence in the first count mentioned, to wit, on, etc., being then employed, etc., and being a constable, etc., and entrusted, etc. (*as in the first count*), did, by virtue of such employment and whilst he was so employed, receive and have in his possession and was entrusted with certain money the property of the queen, and then fraudulently and feloniously did apply the said last mentioned money to his own use and benefit, and did fraudulently and feloniously steal the same, being the property of the queen, from the queen, against, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

That prisoner afterwards, and within six calendar months of his committing the offence in the first count mentioned, to wit, on, etc., being then employed, etc., and being a constable, etc., and entrusted, etc. (*as in the first count*), did by virtue of his

those sums, or for any specific sum of £1 1s. It was held, that the indictment might properly charge the embezzlement of a gross sum, and be proved by evidence similar to the above, and that it was not necessary to charge the embezzlement of each particular sum composing the gross sum, and that, although the evidence might show a large number of small sums embezzled, the prosecution was not to be confined to the proof of such small sums only. See Wh. Cr. L. 8th ed. § 104.

said employment, and whilst he was so employed, receive and have in his possession and was entrusted with certain money, the property of the queen, to wit, the amount of 13s., as and on account of the public service of the queen, and then fraudulently and feloniously did apply the said last mentioned money to his own use and benefit, and did fraudulently and feloniously steal the same, being the property of the queen, from the queen, against, etc.(w) (*Conclude as in book 1, chapter 3.*)

(469k) *Fraudulent bankruptcy in England.*

The jurors for, etc., upon their oath present, that heretofore, and before the committing hereinafter mentioned, to wit, on, etc., a bankruptcy petition was presented against P. C., and the said P. C. was thereupon, to wit, on, etc., adjudged a bankrupt; and that the said P. C., within four months next before the presentation of the said bankruptcy petition against him, to wit, on, etc., by the false representation to one M. B., that he the said P. C. was then buying the property hereinafter mentioned, in part fulfilment of an order for sixty bales, and that he had funds in hand to pay for it, or an equivalent to funds, did obtain, from the said M. B., property, to wit, twenty-five bales of cotton, and has not paid for the same, whereas in truth and in fact the said P. C. was not then buying the said property in part fulfilment of an order for sixty bales, and had not funds in hand to pay for it, and had not an equivalent to funds, as he the said P. C. well knew when he made such false representations as aforesaid, against, etc. (*Conclude as in book 1, chapter 3.*)

(w) This was sustained in *R. v. Graham*, 13 Cox C. C. 57. A., the prosecutor in this case, an inspector of prisons, duly authorized to receive the contributions of parents towards the maintenance of their children committed to reformatory and industrial schools under 29 & 30 Vict. cc. 117, 118, and instructed to pay the amount received into the Bank of England, to the credit of the paymaster-general, employed the prisoner, a member of the police force of the borough of L., as his agent in taking proceedings against the parents of such children for the recovery of such contributions on A.'s behalf, and for generally carrying out the provisions of the reformatory and industrial schools act. Under this employment, which was sanctioned by the treasury department, the prisoner received and misappropriated moneys, the contributions of parents, ordered by magistrates to be paid for the maintenance of their children in the schools. It was held, that the prisoner was, while so employed, in the public service, so as to be within the statute.

Second count.

And the jurors aforesaid, on their oath aforesaid, do further present, that heretofore, and before the committing of the offence hereinafter mentioned, to wit, on, etc., a bankruptcy petition was presented against the said P. C., and the said P. C. was thereupon, to wit, on, etc., adjudged bankrupt; and that the said P. C., within four months next before the presentation of the said petition against him, to wit, on, etc., by the false representation to the said M. B., that he, the said P. C., who was then carrying on business as a cotton broker, was then buying the property hereinafter mentioned as a broker, acting on behalf of a principal, did obtain from the said M. B. property, to wit, twenty-five bales of cotton, on credit, and has not paid for the same, whereas in truth and in fact the said P. C. was not then buying the said property as broker acting on behalf of a principal, as he, the said P. C., well knew at the time when he made such false representation as aforesaid, against, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

And the jurors aforesaid, on their oath aforesaid, do further present, that heretofore, and before the committing of the offence hereinafter mentioned, to wit, on, etc., a bankruptcy petition was presented against the said P. C.; and the said P. C., within four months next before the presentation of the said bankruptcy petition against him, to wit, on, etc., being a trader, to wit, a cotton broker, obtained from the said M. B., under the false pretence of carrying on business dealing in the ordinary way of his said trade, certain property, to wit, twenty-five bales of cotton, on credit, and has not paid for the same, against, etc. (*Conclude as in book 1, chapter 3.*)

Fourth count.

And the jurors aforesaid, on their oath aforesaid, do further present, that heretofore, and before the committing of the offence hereinafter mentioned, to wit, on, etc., a bankruptcy petition was presented against the said P. C., and the said P. C. was thereupon, to wit, on, etc., adjudged bankrupt; and

that the said P. C., within four months next before the presentation of the said bankruptcy petition against him, to wit, on, etc., being a trader, to wit, a cotton broker, with intent to defraud, obtained from the said M. B., under the false pretence of carrying on business in the ordinary way of his trade, property, to wit, twenty-five bales of cotton, on credit, and has not paid for the same, against, etc.(x) (*Conclude as in book 1, chapter 3.*)

(469l) *Ticket scalping, under Pennsylvania statute.*
First count. Setting out ticket.

That A. W., late of the said county, yeoman, on the twenty-eighth day of July, in the year of our Lord one thousand eight hundred and eighty, at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., for and in consideration of the price and sum of nine dollars, lawful money of the United States of America, paid to him the said A. W. by one G. G. B., did then and there unlawfully sell, barter, and transfer to the said G. G. B. the whole of a certain ticket, pass, and evidence of the holder's title to travel on the Pennsylvania Railroad then and there situate, which said ticket and pass is in the words and figures following, that is to say:—

PENNSYLVANIA RAILROAD COMPANY.

THIS TICKET ENTITLES THE HOLDER
 TO
 One First-class passage to
 PITTSBURGH, PENNA.

This ticket is void unless officially stamped and dated. In selling this ticket for passage over other roads this company acts only as agent, and assumes no responsibility beyond its own line. This company assumes no risks on baggage except for wearing apparel, and limits its responsibility to one hundred dollars in value. All baggage exceeding that value will be at the risk of the owner unless taken by special contract. The check belonging to this ticket will be void if detached.

30 31
 40 104

L. P. FARMER,
 Gen'l Passenger Agent.

65 30 31
 PENNSYLVANIA RAILROAD CO.
 One First-class Passage.
 JERSEY CITY
 TO
 PITTSBURGH.
 This check is not good if detached.
 43 21
 PITTSBURGH, PA.
 87 40 104

(x) This indictment was sustained in *R. v. Cherry*, 12 Cox C. C. 32.

And stamped and endorsed on the back thereof—

Penna. Railroad Co. I BOSTON. Passenger Depart- ment.

Penna. Railroad. 208 Washington St. Passenger Depart- ment.
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Penna. Railroad Co. I Passenger Depart- ment.
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He the said A. W., then and there, not being an agent and person in the employ of the said Pennsylvania Railroad Company, and then and there, not being an agent and person possessed of and provided with a certificate duly attested by the corporate seal of the said Pennsylvania Railroad Company, and by the signatures of the officers whose names were then and there signed upon the said ticket and pass, setting forth the authority of him, the said A. W., as such agent of the said Pennsylvania Railroad Company to make sales of tickets and other certificates entitling the holder to travel upon the said Pennsylvania Railroad, contrary, etc. (*Conclude as in book 1, chapter 3.*)

Second count. Not setting out ticket.

That the said A. W., late of the said county, yeoman, on the said twenty-eighth day of July, in the year of our Lord one thousand eight hundred and eighty, at the county aforesaid, and within the jurisdiction of this court, for and in consideration of the price and sum of nine dollars, lawful money of the United States of America, paid to him, the said A. W., by the said G. G. B., did then and there unlawfully sell, barter, and transfer to the said G. G. B. the whole of a certain ticket, pass, and evidence of the holder's title to travel on the Pennsylvania Railroad to Pittsburgh, in the said commonwealth of Pennsylvania, he, the said A. W., then and there, not being an agent and person in the employ of the said Pennsylvania Railroad Company, and then and there, not being an agent and person possessed of and provided with a certificate duly attested by the corporate seal of the said Pennsylvania Railroad Company, and by the signatures of the officers whose names were then and

there signed upon the said ticket and pass, setting forth the authority of him, the said A. W., as such agent of the said Pennsylvania Railroad Company, to make sales of tickets and other certificates entitling the holder to travel upon the said Pennsylvania Railroad, contrary, etc.(y) (*Conclude as in book 1, chapter 3.*)

(y) *Com. v. Wilson*, Phil. Quar. Ses., Legal Intel., Dec. 10, 1880. In this case there was a demurrer to the evidence interposed by the defendant. On this demurrer there was a judgment for the commonwealth. The opinion of the court was given by Ludlow, P. J., who, after stating the statute, proceeded:—

“In the view which we take of this case and of the facts proved, it is unnecessary to decide how far the legislature may restrict the right of an individual to sell a single ticket bought here or in another state, and make it criminal for that individual so to do; much of the reasoning which follows may apply to such a case, but that is not the cause developed by the evidence, for here the testimony produced presents the case of one who has established a *business* in Philadelphia, the whole object of which is to trade in railroad tickets; he is, in fact, a ‘ticket broker.’

“This law is attacked because it violates the provisions of the constitution of the United States, in that it deprives a person of his property without due process of law; abridges the privileges and immunities of citizens of the United States; interferes with the right of congress to regulate commerce with foreign nations and among the several states; and impairs the obligation of contracts.

“And the act is, as is argued, unlawful under our own and the federal constitution, in that it creates a monopoly in lawful business, and is an assumption of power not legislative in its nature.

“It is not true that this act of assembly deprives a person of his property without due process of law, for by the very terms of the act the unused portion of any ticket may be sold to the company which issued it, ‘and it shall be the duty of said company to pay, for such unused portion of the ticket, the difference between the actual fare to the point used, and the amount paid for such ticket.’ Here the owner of the ticket is simply limited in the sale of the ticket to the company from which he bought the same, and is not deprived of it, or his property in it; and if the legislature may upon any valid ground (a point to be hereafter considered) thus limit a right, the law sins not against the clause in the constitution referred to. But it is said that this law abridges the privileges and immunities of citizens of the United States. Upon the facts admitted here, what privilege or immunity of this defendant has been abridged? His right to establish a certain business, which the legislature has declared to be, in the preamble, the cause of ‘numerous frauds,’ has been curtailed, and it may be destroyed; but is this an abridgment of ‘immunity or privilege’ within the meaning of the constitution of the United States? In a state of nature a man may establish any business injurious to health he pleases; he may, unless restrained somehow, destroy at will all who deal with him. In a state of nature men may store gunpowder in dangerous places, sell tainted meat, liquor without inspection and license, set up gambling houses and houses of ill-fame, and do numerous other acts which any thinking man may imagine; but civilized men, living under a benign government, easily recognize the principle that rights and duties are reciprocal, and that these may grow out of the very fact, that men surrender a portion of their natural rights, in order that they may live together in civilized countries, under a common rule of action called the law.

“This principle was embodied in an authoritative declaration of the law by the court, in *Corfield v. Coryell*, 4 Washington C. C. 371, where the meaning of

the words now under consideration claimed and received the attention of the court:—

“We feel no hesitation in confining these expressions to privileges and immunities which are fundamental. . . . Among these are protection by the government of the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, *subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.*”

“If the clause in the constitution is to receive the construction contended for in this case, then all the laws above referred to, and many others which might be named, which, under a well-known principle (to be hereafter specified), have been sustained, must be in conflict with the constitution of the United States, because the citizens’ privileges and immunities have been destroyed or ‘abridged,’ and are void. To state such a result is to answer the argument made in this case upon this point. But it is argued that the act of assembly impairs the obligation of a contract. The ticket sold in this case was simply, at best, the evidence of a contract, and not the contract itself. For convenience these tickets have been introduced, and the person who presents the ticket exhibits a card in the nature of a receipt; before this ticket was sold the act of assembly was passed, and when, therefore, the contract itself was made, this defendant must be presumed to have known that to contract with any one who was not an authorized agent of the company which had sold the ticket was a criminal act.

“The question in my mind is, not what was the contract made by the original holder of the ticket with the company in Boston, but what was the contract made in this jurisdiction. Was or was not that a contract prohibited by law? If the state can, for any legal reason, limit or restrain the sale of these receipts, then any contract made is illegal and void, and no obligation is ‘impaired’ under the constitution of the United States, for none legally existed or could exist.

“The last point made and ably argued by the learned counsel for defendant, Mr. Hepburn, will develop the true principle upon which this law must be sustained, and will moreover develop and illustrate the admirable manner in which, upon a true interpretation of the law, the constitution of the United States, and the sovereign authority of the individual states, may not only be harmonized, but made effective, under our delicate and complicated system of government.

“By Article X. of the amendments to the constitution of the United States, it is expressly provided, ‘That the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.’

“In the case of the *Railroad Co. v. Husen*, 5 Otto, 465, the supreme court of the United States declares, ‘We admit that the deposit in congress of the power to regulate foreign commerce, and commerce among the states, was not a surrender of that which may properly be denominated police power. What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. . . . It may be admitted that the police power of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, pauperism, or disturbance of the peace.’

“No state legislature may with impunity interfere with the power which congress possesses ‘to regulate commerce with foreign nations and among the several states.’ Why? Because this power has been directly vested in congress by the several states and the people thereof.

“Any obstacle to commerce or burden laid upon it is, by the authority of the supreme court of the United States, from the leading case of *Gibbons v. Ogden*, 9 Wheaton, 1, to the present time, unconstitutional and void. To fall, however, within the prohibition, the law must be an obstacle or a burden within the meaning of the decision of the supreme court of the United States.

“Can it be contended that a law which prohibits that which has become a fruitful source of crime is an obstacle or burden to commerce between the states?

"The law in effect declares that the railroad companies as common carriers shall exercise their franchises subject to a duty, to wit, the repurchase of unused tickets, but for reasons of public policy no unauthorized agent shall sell these tickets to any one. How does this limitation or restriction hinder transportation of either men or things, and 'transportation (as has been said) is essential to commerce, or rather it is commerce itself.' See *R. R. Co. v. Husen, supra*.

"The law does not prohibit the sale of tickets at all, but only limits the right to authorized agents of the company, and compels the common carrier, that is, the company, to repurchase. To prove that the power exercised in this instance by the legislature of Pennsylvania, is in no just and legal sense such a regulation of 'commerce between the states' as to impinge upon any provisions in the constitution of the United States, is not only to answer the last objection made to this act, but to develop the principle which sustains this and kindred laws.

"We have already adverted to the fact, that there resides in every commonwealth a fundamental right to protect her citizens.

"In *R. R. Co. v. Husen, supra*, it was said, 'We admit that the deposit in congress of the power to regulate foreign commerce, and commerce among the states, was not a surrender of that which may properly be denominated police power.' The principle thus admitted is founded, under the constitution of the United States, in the rights reserved to the states and the people thereof, and it has not only received the sanction of the highest court under the government of the United States, but that sanction has been emphasized in the *Slaughter House Cases*, 16 Wal. 83, where the majority of the court firmly maintained the right of the state under the constitution. The power to create a police regulation then resides in the state, and in the state alone. Has the legislature of Pennsylvania exercised her right to declare what shall become a constitutional police regulation with reference to the sale of unused railroad tickets, as a business, to be transacted by brokers throughout the commonwealth, or has a law been enacted which establishes a monopoly? It would be useless to refer to a multitude of acts, already upon the statute book, in which this power has been used. The learned assistant district attorney, Mr. Ker, referred in detail to at least fifteen or twenty laws, all of them analogous in principle to the law now under consideration. It would also be a mere affectation of learning to cite from the reported decisions of the United States Supreme Court, case after case, in which the right of a state to enact laws, in principle identical with the law now before the court, has been affirmed. Already we have in this opinion referred to opinions which, in our judgment, rule this cause. It is enough now to say, that in the case reported as the *Slaughter House Case*, and cited *supra*, the doctrines pronounced by the supreme court of the United States, not only embrace a cause like the one now before this court, but go much beyond it. That great cause did not decide that a monopoly might be created, but that a commonwealth might do that which was demanded for the public welfare. Even Mr. Justice Field, one of the dissenting judges, declared that this 'power extends to all regulations affecting the health, good order, morals, peace, and safety of society, and is exercised in a great variety of subjects, and in numberless ways.' In the argument of this cause it was publicly stated, by the learned gentleman, Mr. MacVeagh, who assisted the district attorney, that large numbers of tickets had been stolen from emigrants going west, before the trains had passed Harrisburg; other tickets, which had expired by limitation of time, had been sold to ignorant and unsuspecting victims, while the conductors upon the road were daily importuned by the agents of brokers to sell to them unused tickets, thus presenting a temptation to otherwise honest men to become plunderers of the stockholders of this road. I do not take for granted these facts, and express no judgment upon them, but I have a right to assume that reasons based upon such facts were presented to the legislature, and that, influenced by these reasons thus presented, the legislature intended to destroy a business detrimental to good morals, and as bad in its effects as gambling itself. Viewed in this light, the preamble to this act of assembly has an incisive force. That preamble reads thus:—

“ ‘Whereas, numerous frauds have been practised upon unsuspecting travellers by means of the sale by unauthorized persons of railway and other tickets, and also upon railroads and other corporations, by the fraudulent use of tickets, in violation of the contract of their purchase,’ etc. etc. Upon the trial of this very cause it appeared in evidence that, in addition to the ticket purchased from Altoona west, this defendant sold a pass, which had been given to an employé of the road to enable him to travel from Altoona to Philadelphia *and return*. This employé, finding his services wanted here, sold the return pass to this defendant, who in turn sold it to the purchaser who testified in the cause.

“ A double fraud was thus perpetrated—one by this defendant, who knew exactly what he bought and afterwards sold, and the other by the employé, who might have been saved from this perpetration of a fraud upon the stockholders of this company, but for the temptation held out to him by this defendant. We have nothing to do with the wisdom of this act of assembly. With the facts, however, before me, it is not difficult to understand why the legislative department of the government determined that the time had arrived when a business which produced results such as has been specified, should be utterly destroyed, and, by a police regulation, it has been declared to be a criminal act to establish a brokerage business in the sale of ‘the whole or any part of any ticket or tickets, passes, or other evidence of the holder’s title to travel on any railroad, steamboat, or other public conveyance. This act of assembly is, under the evidence in this cause, constitutional, and judgment will be entered, upon the demurrer to the evidence, for the commonwealth.’ ”

MALICIOUS MISCHIEF.

CHAPTER VIII.

MALICIOUS MISCHIEF.(a)

- (470) Maliciously wounding a cow.
- (471) Giving cantharides to prosecutors.
- (472) Tearing up a promissory note.
- (473) Cutting down trees the property of another, not being fruit, or cultivated, or ornamental trees, under Ohio statute.
- (474) Destroying vegetables, under Ohio statute.
- (474a) Malicious mischief to cow, under Alabama statute.
- (475) Killing a heifer, under Ohio statute.
- (476) Cutting down trees, etc.
- (476a) Cutting trees, under English statute.
- (477) Killing a steer, at common law.
- (478) Altering the mark of a sheep, under the North Carolina statute.
- (479) Second count. Defacing mark.
- (480) Entering the premises of another, and pulling down a fence.
- (481) Destroying two lobster cars, under the Massachusetts statute.
- (482) Removing a landmark, under the Pennsylvania statute.
- (483) Felling timber in the channel of a particular creek, in a particular county, under the North Carolina statute.
- (484) Throwing down fence, under Ohio statute.
- (485) Breaking into house, and frightening a pregnant woman.
- (486) Cutting ropes across the ferry.
- (487) Breaking glass in a building. Mass. Rev. Sts. ch. 126, § 42.
- (488) Burning a record.
- (488a) Blowing up dwelling-house, under English statute.
- (488b) Throwing gunpowder in house, under English statute.
- (488c) Setting spring guns, under English statute.
- (488d) Injury to goods in the loom, under English statute.
- (488e) Destroying machine, under English statute.
- (488f) Injury to railway train, under English statute.
- (488g) Injury to crops, under English statute.
- (488h) Damaging chattels, under English statute.

[For several forms of indictments which may be classed under this head, see "*Breaches of the Peace*," "*Assaults*," etc., as noticed in *index*.]

(a) For the offence generally, see Wh. Cr. L. 8th ed. § 1065 *et seq.*

(470) *Maliciously wounding a cow.*(b)

That A. B., etc., on, etc., at, etc., one cow,(c) of the price of seven pounds, of the goods and chattels of C. D.,(d) then and there being, thereby maliciously intending to injure the same C. D.,(e) unlawfully, wilfully, and maliciously did wound, to the great damage of the said C. D., against, etc. (*Conclude as in book 1, chapter 3.*)

(471) *Giving cantharides to prosecutors.*(f)

That A. B., etc., on, etc., at, etc., unlawfully did assault M. A. W. and M. C., and then and there unlawfully, knowingly, wickedly, and maliciously did administer to, and cause to be administered to and taken, by the said M. A. W. and M. C. a large quantity, that is to say, two scruples, of cantharides, the same then and there being a deleterious and destructive drug, with intent thereby to injure the health of the said M. A. W. and M. C., and the said M. A. W. and M. C. thereby then and there became sick, sore, diseased, and disordered in their bodies, insomuch that their lives were despaired of, to the great damage, etc.

(b) Stark. C. P. 463. As to the validity of this indictment at common law, see *State v. Wheeler*, 3 Vt. 344; *Com. v. Leach*, 1 Mass. 59; *People v. Smith*, 5 Cow. 258; *Loomis v. Edgerton*, 19 Wend. 419; *Res. v. Teischer*, 1 Dall. 335; *State v. Council*, 1 Overt. (Tenn.) 305.

(c) This is a sufficient description. *State v. Pearce*, Peck, 66. The same precision should be used as in larceny. *Supra*, notes to form 415, pp. 381 *et seq.*; Wh. Cr. L. 8th ed. § 1078. Value need not ordinarily be averred unless required by statute. Wh. Cr. L. 8th ed. § 1078.

(d) This is essential. Wh. Cr. L. 8th ed. § 1078. Any mistake in the name of the owner will be fatal. *Haworth v. State*, Peck, 89. Observe the same particularity as in larceny. See *supra*, notes to form 415, pp. 381 *et seq.*

(e) It has been held not necessary at common law, separately to charge malice against the owner. *State v. Scott*, 2 Dev. & Bat. 35. But the more prudent course is to make such averment. *State v. Jackson*, 12 Ired. 329; *Hobson v. State*, 44 Ala. 380.

(f) See *R. v. Button*, 8 C. P. 660, where this indictment was sustained. But in England, it now seems, the offence here stated is no longer considered a misdemeanor at common law. *R. v. Dilworth*, 2 Moo. & Rob. 531; *R. v. Hanson*, 2 C. & K. 912.

This count, which in this country would be classed under the head of malicious mischief, appears to have been treated as an indictment for an assault at common law, and to have been sustained as such. Whatever may be its nature, it is important as a precedent.

(472) *Tearing up a promissory note.*

That, etc., on, etc., at, etc., a certain promissory note for the payment of money, commonly called a due-bill, made and drawn by the said W., in favor of one A. R. C., and dated for the sum and of the value of five dollars, of the property of the said A., the said note and due-bill being then and there due and unpaid by him the said W., did wilfully, maliciously, and fraudulently tear and destroy, with the intent then and there and thereby to cheat and defraud the said A., to the great damage of the said A., to the evil example of all others in like case offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(473) *Cutting down trees the property of another, not being fruit, or cultivated, or ornamental trees, under Ohio statute.*

That A. B., C. D., and E. F., on the tenth day of November, in the year of our Lord one thousand eight hundred and forty-six, at the township of Independence, in the county of Cuyahoga aforesaid, thirty living trees, standing on land then and there owned by M. N. and O. P., did maliciously, wrongfully, and without any lawful authority, cut down and destroy; the said trees not being then and there fruit or ornamental trees, and not trees standing or growing in any nursery, garden, orchard, or yard.(g)

(474) *Destroying vegetables, under Ohio statute.*

That A. B., on the day of in the year of our Lord one thousand eight hundred and at Wayne township, in the county of Muskingum aforesaid, wilfully, maliciously, and without lawful authority, did cut down, sever, and injure two thousand stalks of a certain cultivated root and plant called Indian corn, of the value of fifty dollars, said plants, stalks, and corn then and there standing and growing on the lands of another, to wit, the lands of one M. N., there situate.(h)

(g) See Warren's C. L. 156.

(h) Warren's C. L. 156.

(474a) *Malicious injury to a cow. Alabama form.*

State of Alabama, }
 Coffee County. } Circuit Court, Spring Term, 1871.

The grand jury of, etc., charge, that C. C., before the finding of this indictment, unlawfully and maliciously disabled or injured a cow, the property of J. H., against the peace, etc.(i)
(Conclude as in book 1, chapter 3.)

(475) *Killing a heifer, under Ohio statute.(j)*

That A. B. and C. D., on the eighteenth day of October, in the year of our Lord one thousand eight hundred and fifty-two, in the county of Cuyahoga aforesaid, wilfully, maliciously, and purposely did kill and destroy a certain heifer, then and there being found, and the property of M. N., of the value of twelve dollars, by then and there *(here set out the manner of killing)*, which said heifer was not then and there trespassing in any inclosure of the said A. B.(k)

(476) *Cutting down trees, etc.(l)*

That A. B., etc., on, etc., at, etc., wilfully and maliciously did cut down and destroy ten ash-trees, planted in a certain avenue to the dwelling-house of one M. N., and then growing for ornament there (he the said M. N. then and there being then owner of the said trees, which the said A. B., etc., then and there well

(i) This was held good in *Caldwell v. State*, 49 Ala. 34.

(j) It should be observed that in Ohio the statute should be followed closely, as the offence does not exist at common law.

(k) Warren's C. L. 147.

(l) See Stark. C. P. 463. This form may be good at common law. *Com. v. Eekert*, 2 Browne, 251; *Loomis v. Edgerton*, 19 Wend. 420; though see Brown's case, 3 Greenl. 177. See Wh. Cr. L. 8th ed. § 1067.

In an indictment for cutting timber under the Pennsylvania statute, it was held sufficient to aver that the defendants, the tree in question (describing it) "did cut down and fell, they, the said, etc., well knowing the said tree to be growing on the land of the said J. H., etc., and that the land on which the said tree was growing did not belong to them the said defendants, or either of them, or to any person by whom they or either of them was authorized," etc. *Moyer v. Com.*, 7 Barr, 439. See the remarks of a learned correspondent of the *Am. L. J.*, on this point, 4 *Am. L. J.* 130. The form in Wh. Prec. 1st ed. 223, is certainly insufficient, and I am happy to take this opportunity not only of correcting it, but of returning my acknowledgments to the gentleman by whom the error was pointed out. (See, also, *Com. v. Betchel*, 1 *Am. L. J.* 414, and remarks.)

knew), to the great damage of the said M. N., against, etc. (*Conclude as in book 1, chapter 3.*)

(476a) *Cutting trees, under English statute.*

That J. S., etc., on, etc., at, etc., two elm trees, the property of J. N., then growing in a certain park of the said J. N., situate, etc., feloniously, unlawfully, and maliciously did cut and damage, thereby, then and there doing injury to the said J. N. to an amount exceeding one pound, to wit, to the amount of ten pounds, against, etc.(m) (*Conclude as in book 1, chapter 3.*)

(477) *Killing a steer, at common law.(n)*

That D. S., etc., on, etc., at, etc., one steer, of the value of five dollars, of the goods and chattels of one L. M'C., then and there

(m) Arch. C. P. 19th ed. p. 599.

(n) State v. Scott, 2 Dev. & Bat. 35.

Daniel, J., after stating the substance of the case in detail, proceeded: "We see no ground for a new trial in this case. The evidence objected to was admitted—and, as we think, correctly—to repel an allegation made by the defendant, of an *alibi*. And after the evidence was admitted by the court, the weight and effect of it was matter for the jury only; and it seems to us, that there was nothing left for the court to remark upon, especially, as no particular charge concerning this evidence was prayed by the defendant. We have examined the reasons in arrest, and concur in opinion with the judge who pronounced the judgment. 1st. The two detached pieces of paper writing purporting to be a transcript of the record, contained everything necessary to give Buncombe superior court jurisdiction; it contained the indictment, plea, and order of removal. In that shape it was entered on the state docket, and the defendant went to trial. From great caution, the judge suspended judgment at the trial term, and sent a *certiorari* for such a record as could not be cavilled about. At the term judgment was rendered, the record was unexceptionable, and showed that the two pieces of paper which had been received as the record of the case, and on which the defendant had been tried, contained a true and complete transcript of the record when it was removed from Rutherford. So, when judgment was pronounced, the record showed that the case had been properly removed, and that Buncombe superior court had jurisdiction of the case at the term the trial took place. The record being unexceptionable when judgment was prayed, there was nothing to restrain the judge from pronouncing it.

"2d. This court decided, in the case of the State v. Simpson, 2 Hawks, 460, that an indictment for malicious mischief, which concluded at common law, was good.

"That decision was made in the year 1823, and since that many convictions on indictments for malicious mischief at common law, have taken place in the circuits of this state. In the year 1826, the legislature indirectly approved of the decision; for in the act limiting the time that indictments for misdemeanors should be brought, it is declared, that in all trespasses and other misdemeanors except the offences of perjury, forgery, malicious mischief, and deceit, the prosecution shall commence within three years after the commission of the offence.

being, then and there unlawfully, wantonly, maliciously, and mischievously did kill, to the great damage of the said L. M'C., and against, etc. (*Conclude as in book 1, chapter 3.*)

(478) *Altering the mark of a sheep, under the North Carolina statute.*(o)

That J. D., etc., on, etc., at, etc., feloniously and knowingly did alter the mark of one sheep, the property of W. M'C., know-

After what has taken place, we think the period too late for us now to examine further into the question.

“3d. The objection is, that the indictment does not charge malice against the owner of the property. We have looked into the books of forms and precedents, and find that the form of this indictment corresponds with the forms prescribed in the books. What evidence the state must produce to support such an indictment as this, we are not called on to decide. We think there is no ground for a new trial or arrest of judgment, and this opinion will be certified to the superior court of law for the county of Buncombe, that it may proceed to final judgment in the case.”

(o) *State v. Davis*, 2 Iredell, 153.

Gaston, J. : “We are of opinion that the appellant has not shown any error in the instructions to the jury, nor sufficient reasons to arrest the judgment.

“The indictment is founded on the act of 1822, c. 1155, re-enacted in the revised sts. ch. 34, § 55, whereby it is declared, ‘that if any person shall knowingly alter or deface the mark or brand of any person’s neat cattle, sheep, or hog, shall knowingly mismark or brand any unbranded or unmarked neat cattle, sheep, or hog, not properly his own, with intent to defraud any other person, he shall, on conviction in a court of record, be liable to corporal punishment in the same manner as on a conviction of petit larceny.’ The manifest purpose of the legislature is to punish the act of changing or defacing these marks or brands, which are the ordinary indications of ownership in property of this description, and also the act of putting false marks or brands thereon, with intent to injure the owner by either depriving him of the property or rendering his title thereto more difficult of proof. Now, when the act of wilfully changing or defacing the mark is fixed upon the person accused, and no explanation is given of the act to render it consistent with an honest purpose, the conclusion follows irresistibly that it was done with intent to effect the injury which is the ordinary and necessary consequence of the act. Such intention is directed against the owner, whoever he may be, and the charge that the act was done with intent to injure any individual named, is made out, when it is shown that *he* was the owner at the time when the act was committed.

“It has been contended by the counsel for the appellant, that the offence created by the statute and charged in the indictment could not have been committed, because at the time when the act was done, the animal had strayed from the possession of the owner, and the statute, by declaring that the offender shall be liable to corporal punishment in the same manner as on a conviction of petit larceny, must be understood as applying to those cases only wherein the offender, by a felonious appropriation of the animal, would have committed the crime of petit larceny. He further urges that this construction of the statute is strengthened by the circumstance, that a special provision is made by the statute for improper interference with strays, in ch. 112, § 8. We do not concur in this construction of the statute. In the description of the offence thereby created, no reference is made to the crime of larceny. The offence consists in knowingly

ingly, with intent to defraud the said W. M'C., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(479) *Second count. Defacing mark.*

That J. D., etc., on, etc., at, etc., knowingly did deface the mark of a sheep, the property of one W. M'C., then and there, with an intent to defraud the said W. M'C., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(480) *Entering the premises of another and pulling down a fence.(p)*

That T. C., etc., on, etc., at, etc., into a certain close of a certain A. M., situate in the township and county aforesaid, in and upon the possession thereof of the said A., into which the said T. had not legal right of entry, did enter, and ten panels of fence of the said A., then and there standing and being, then and there did pull down, take, and carry away, to the great damage of the said A., and against, etc. (*Conclude as in book 1, chapter 3.*)

altering and defacing the mark of, or in knowingly mismarking an animal, the property of another, with intent to defraud. The mere straying of the animal from the owner's premises makes no change of property. The animal still remains his, and the wrongful act is not less calculated, but in fact more likely to do him an injury, than it would be if done to an animal in his immediate possession. The reference in the statute to the punishment in cases of petit larceny does not affect the description of the offence, more than it would have affected that description, if the reference had been to the punishment in cases of perjury or forgery, or of any other crime. It only denounces against the offence previously described, the same penalty by which the existing law is inflicted upon a conviction of petit larceny. The construction contended for is not unwarranted by the language of the statute, but would render the statute itself inoperative in the case, which mainly rendered it necessary. Nor does the section referred to in ch. 112 provide for an offence of this description in cases of strays. The object of the legislature in that chapter is to point out a mode of proceeding in those cases, whereby the owner may be enabled to regain the possession of his property or to get the value thereof, and a proper compensation may be made to those who shall render him the assistance for this purpose; and, in furtherance of this object, the eighth section imposes a pecuniary mulct on those who may take up or use the stray otherwise than in the mode therein directed.

"The motion in arrest of judgment rests on two grounds. The first is, for that the offence is not described in the language of the statute. This objection applies only to the first count of the indictment, and as to that is well taken. The first count charges that the accused did alter the *make* of the sheep. No doubt the word 'make' was intended to be written 'mark,' but it is a different word, having a different signification, and cannot be brought within the exception of *idem sonans*. But this mistake is not in the second count, which charges that he defaced the mark of the sheep; and a general verdict of guilty having been rendered, judgment will not be arrested, if either count be sufficient to warrant it."

(p) This indictment was drawn in 1779, by Mr. J. D. Sergeant, then attorney-general of Pennsylvania. See "Forcible Entry and Detainer," *post*, 489, etc.

(481) *Destroying two lobster cars, under the Massachusetts statute.(q)*

That A. B., etc., on, etc., at, etc., did wilfully, maliciously, and secretly, in the night-time, destroy and injure two lobster cars, two brass locks attached to said cars, and two cables, by which said cars were moored and fastened, and three hundred lobsters contained in the cars aforesaid, all being the property of one F. W., etc.

(482) *Removing a landmark, under the Pennsylvania statute.(r)*

That L. S., etc., on, etc., at, etc., one bounded growing oak-tree, being one of the landmarks of a tract of plantable land, whereof J. B. was then and there seized in his demesne as of fee, at township aforesaid, and within, etc., secretly, unjustly, and without the consent or knowledge of the said J. B., did cut down and remove, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(483) *Felling timber in the channel of a particular creek, in a particular county, under North Carolina statute.(s)*

That H. C., etc., on, etc., at, etc., unlawfully and maliciously did fell timber in the channel of Hogan's creek, in the county of Caswell aforesaid, and did then and there, by such felling of timber aforesaid, on the twentieth day of February aforesaid, obstruct the channel of the creek aforesaid, in the county of Caswell aforesaid, to the great damage of the owners of the land on the said creek, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*For cutting and stealing trees, see supra, 445d.*)

(484) *Throwing down fence under Ohio statute.*

That A. B., on the day of in the year of our Lord
one thousand eight hundred and in the county of Mus-

(q) On this count, framed upon the Rev. Sts. ch. 126, § 39, alleging that the defendant wilfully destroyed and injured a cable by which a fish car was moored and fastened, proof that he wilfully, etc., cut off such a cable a few feet from one end thereof, was held sufficient to warrant his conviction. *Com. v. Soule*, 2 Met. 21.

(r) This indictment is taken from Reed's Digest, and is drawn on the provincial act of 1700; 1 Smith's Laws, 4.

(s) *State v. Cobb*, 1 Dev. & Bat. 115.

kingum aforesaid, did wantonly and maliciously throw, put, and lay down and prostrate twenty panels of a certain fence there situate, said fence then and there inclosing a certain field there situate, in which said field a certain grain, called wheat, was then and there cultivated, said fence, field, and grain being then and there the property of another person than the said A. B., to wit, the property of one M. N., and being then and there lawfully occupied by the said M. N., and he the said A. B. did then and there wantonly and maliciously leave said twenty panels of said fence down, prostrate, and open.(t)

(485) *Breaking into house, and frightening a pregnant woman.*(u)

That A. B., etc., on, etc., at, etc., about the hour of ten of the

(t) Warren's C. L. 172.

(u) Com. v. Taylor, 5 Binn. 277. "But supposing," said Tilghman, C. J., "the indictment not to be good for a forcible entry, may it not be supported on other grounds? In the case of *The Com. v. Teischer*, 1 Dall. 335, judgment was given against the defendant for '*maliciously, wilfully, and wickedly killing a horse*.' These are the words of the indictment, and it seems to have been conceded by Mr. Sergeant, the counsel for the defendant, that if it had been laid to be done *secretly*, the indictment would have been good. Here the entering of the house is laid to be done '*secretly, maliciously, and with an attempt to disturb the peace of the commonwealth*.' I do not find any precise line by which indictments for malicious mischief are separated from actions of trespass. But whether the malice, the mischief, or the evil example is considered, the case before us seems full as strong as *Teischer's* case. There is another principle, however, upon which it appears to me that the indictment may be supported. It is not necessary that there should be actual force or violence to constitute an indictable offence. Acts injurious to private persons, which tend to excite violent resentment, and thus produce fighting and disturbance of the peace of society, are themselves indictable. To send a challenge to fight a duel is indictable, because it tends directly towards a breach of the peace. Libels fall within the same reason. A libel even of a *deceased person* is an offence against the public, because it may stir up the passions of the living and produce acts of revenge. Now what could be more likely to produce violent passion and a disturbance of the peace of society, than the conduct of the defendant? He enters *secretly after night* into a private dwelling-house, with an intent to disturb the family, and after entering makes such a noise as to terrify the mistress of the house to such a degree as to cause a miscarriage. Was not this enough to produce some act of desperate violence on the part of the master or servants of the family? It is objected that the kind of noise is not described; no matter, it is said to have been made *vehemently and turbulently*, and its effects on the pregnant woman are described. In the case of the *King v. Hood* (Sayer's Rep. in K. B. 16'), the court refused to quash an indictment for disturbing a family by violently kicking at the front door of the house for the space of two hours. It is impossible to find precedents for all offences. The malicious ingenuity of mankind is constantly producing new inventions in the art of disturbing their neighbors. To this invention must be opposed general principles, calculated to meet and punish them. I am of opinion that the conduct of the defendant falls within the range of established principles, and that the judgment of the court below should be reversed." See similar precedent, *post*, 868.

clock in the night of the same day, with force and arms, at Lurgan township, in the county aforesaid, the dwelling-house of J. S., there situate, unlawfully, maliciously, and secretly did break and enter, with intent to disturb the peace of the commonwealth; and so being in the said dwelling-house, unlawfully, vehemently, and turbulently did make a great noise, in disturbance of the peace of the commonwealth, and greatly misbehave himself in the said dwelling-house, and E. S., the wife of the said J., greatly did frighten and alarm, by means of which said fright and alarm, she the said E., being then and there pregnant, did on the seventh day of September, in the year aforesaid, at the county aforesaid, miscarry, and other wrongs to the said E. then and there did, to the evil example, etc.

(486) *Cutting ropes across the ferry.*(v)

That H. K., etc., on, etc., at, etc., did maliciously and wantonly cut two ropes stretched across the river Schuylkill by C. P. *et al.*, the occupiers of the ferry over Schuylkill, commonly called the upper ferry, and that the said ropes are used in drawing boats and carrying travellers over the same river and ferry, to the great damage of the said C. P., and against, etc. (*Conclude as in book 1, chapter 3.*)

(487) *Breaking glass in a building.* Mass. Rev. Sts. ch. 126, § 42.

That C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord with force and arms at B. aforesaid, in the county aforesaid, wilfully, maliciously, wantonly, and without cause, did break and destroy the glass, to wit, ten panes of window glass, each of the value of one dollar, of the property of one A. B., in a certain building there situate, not his the said C. D.'s own, but which building then and there belonged to and was the property of the said A. B., the said glass then and there being parcel of the realty, to wit, of the building aforesaid,(w) against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(v) Drawn and prosecuted in 1773, by Mr. Andrew Allen, then attorney-general of Pennsylvania.

(w) See as to necessity of this allegation, *Com. v. Bean*, 6 Bost. Law Rep. N. S. 387.

(488) *Burning a record.(x)*

That H. E., etc., L. K., etc., W. H., etc., M. H., etc., and G. S., etc., on, etc., at, etc., a certain paper writing, containing in itself a certificate of four sufficient housekeepers of the neighborhood, inhabiting in and near the said township, and with their names subscribed, and to the justices of the peace of the same county directed, that they the said housekeepers had laid out a road and highway in the said township, according to an order of the same justices in their quarter sessions made for the laying out the same, which to the same justices in their quarter sessions had been legally made, certified, and returned, and of record affiled, according to the act of assembly in such case made and provided, to wit, at the city of Philadelphia, in the said county, unjustly and unlawfully did burn and destroy, to the manifest contempt of the good laws of this province, to the evil example of all others in the like case offending, against, etc. (*Conclude as in book 1, chapter 3.*)

(488a) *Blowing up dwelling-house, under English statute.*

— feloniously, unlawfully, and maliciously did, by the explosion of a certain explosive substance, that is to say, gunpowder, destroy (*or throw down or damage*) the dwelling-house of J. N., situate, etc., whereby the life of one A. N. was endangered, against, etc.(y) (*Conclude as in book 1, chapter 3.*)

(488b) *Throwing gunpowder in house with intent, under English statute.*

— feloniously, unlawfully, and maliciously did throw into the dwelling-house of J. N., situate, etc., a large quantity, to wit, two pounds, of a certain explosive substance, that is to say, gunpowder, with intent thereby, then to destroy the said dwelling-house, against, etc.(z) (*Conclude as in book 1, chapter 3.*)

(x) Drawn by Tench Francis (attorney-general of Pennsylvania), some years before the Revolution, though I have been unable to fix the exact date. The approval of this, and of several kindred precedents under the head of "Malicious Mischief," "Nuisances," etc., shows the liberality with which the common law was applied under the colonial system.

(y) Arch. C. P. 19th ed. p. 571.

(z) Arch. C. P. 19th ed. 572.

(488c) *Setting spring-gun, etc., under English statute.*

— unlawfully did set and place and cause to be set and placed, in a certain garden, situate, etc., a certain spring-gun (or man-trap, or engine calculated to destroy human life), which was then loaded and charged with gunpowder and divers leaden shot, with intent that the said spring-gun, so loaded and charged as aforesaid, should inflict grievous bodily harm upon any trespasser (or person) who might come in contact therewith; against, etc.(a) (*Conclude as in book 1, chapter 3.*)

(488d) *Malicious injury to goods in the loom, under English statute.*

That J. S., etc., on, etc., at, etc., twenty-five yards of woollen cloth, of the goods and chattels of J. N., in a certain loom then and there being, feloniously, unlawfully, and maliciously did cut and destroy, against, etc.(b) (*Conclude as in book 1, chapter 3.*)

(488e) *Destroying machines, under English statute.*

That J. S., etc., on, etc., at, etc., a certain threshing machine, the property of J. N., feloniously, unlawfully, and maliciously did cut, break, and destroy, against, etc.(c) (*Conclude as in book 1, chapter 3.*)

(488f) *Injury to railway train, under English statute.*

That J. S., on, etc., at, etc., feloniously, unlawfully, and maliciously did put and place a piece of wood upon a certain railway, called in, etc., with intent thereby then to obstruct, upset, overthrow, and injure a certain engine and certain carriages using the said railway, against, etc.(d) (*Conclude as in book 1, chapter 3.*)

(488g) *Setting fire to crops of corn, under English statute.*

— feloniously, unlawfully, and maliciously did set fire to a certain crop of wheat (or hay, or other crop covered by statute), of the

(a) Arch. C. P. 19th ed. p. 733.

(b) Arch. C. P. 19th ed. p. 576.

(c) Arch. C. P. 19th ed. p. 578.

(d) Arch. C. P. 19th ed. p. 593, citing *R. v. Bradford, Bell*, 268; *R. v. Hadfield, L. R. 1 C. C. R. 253*; *R. v. Sanderson*, 1 F. & F. 37.

goods and chattels of J. N., then standing and growing, against, etc.(e) (*Conclude as in book 1, chapter 3.*)

(488h) *Damaging chattels, under English statute.*

The jurors for, etc., upon their oath present, that M. T., on, etc., in and upon three frocks, six petticoats, one flannel petticoat, one flannel vest, one pinafore, one jacket, one pair of knickerbockers, one flannel night-gown, one woollen cape, one sash, one table-cloth, one sheet, three hats, and one brooch of the value of twenty pounds, and of the property of G. A., unlawfully and maliciously did commit certain damage, injury, and spoil to an amount exceeding five pounds, by unlawfully and maliciously cutting and destroying the same, against, etc.(f) (*Conclude as in book 1, chapter 3.*)

(e) Arch. C. P. 19th ed. 569.

(f) In *R. v. Thoman*, 12 Cox C. C. 54, it was held that in the above indictment it was not necessary to allege the value of each article injured, but only that the amount of the damage done to the several articles exceeded £5 in the aggregate.

CHAPTER IX.

FORCIBLE ENTRY AND DETAINER. (a)

(489) General frame of indictment at common law.

(490) Another form of same.

(491) Against one, etc., at common law, with no averment of either leasehold or freehold possession in the prosecutor.

(a) Before considering the pleading in forcible entry and detainer, the general character of the offence will be considered.

(*Forcible entry at common law.*) The assertion of right to lands or houses by force has always been discouraged by courts, from a just apprehension of the tumults to which such proceedings may lead. Although, therefore, no indictment will lie for a mere trespass, accompanied only by constructive force, yet it seems to be established that an entry on land, or into a house, garden, etc., or a church, though no one be therein, with such actual violence as amounts to an unlawful act, or public breach of the peace, expressed in law to be "with force and arms and a strong hand," *e. g.*, bringing unusual weapons, threatening violence, breaking open a door, or violent ejection of the possessor of a house, is an offence indictable at common law, as a forcible entry (*Langdon v. Potter*, 3 Mass. 215; *Harding's case*, 1 Greenl. 22; *Com. v. Taylor*, 5 Binn. 277; *Newton v. Harland*, 1 Man. & G. 644; *Cruiser v. State*, 3 Harrison, 206; *State v. Mills*, 2 Dev. 420; *State v. Spierin*, 1 Brevard, 119), though the statute gives other remedies to the parties aggrieved, viz., restitution and damages; and that the illegal and violent maintenance of possession, if the entry was unlawful, is, in like manner, indictable as a forcible *detainer*. *R. v. Newlands*, 4 Jur. 322, *Littledale, J.*; *Le Blanc, J.*, *R. v. Wilson* and others, 8 T. R. 363; *Ld. Kenyon*, *Ib.* 357; *Co. Lit.* 257; *R. v. John Wilson*, 3 A. & E. 817; *S. C.*, 5 N. & M. 164; *Com. Dig. tit. Forcible Entry* (A. 1, 2, B. 1). An entry, though by one person only, will be forcible, if either by act or threat at the time of his entry he gives the party in possession just cause to fear bodily hurt if he does not give way; and the same circumstances of violence or terror which make an entry forcible, make a detainer forcible also. A detainer may be forcible whether the entry were so or not (*Hawk. b. 1, c. 64*; *Com. Dig. tit. Forcible Entry*), if such entry was unlawful. *R. v. Oakley*, 4 B. & Ad. 307; 1 N. & M. 58. Though a breach of the peace is necessary to constitute the offence (*Com. v. Dudley*, 10 Mass. 403), it seems that no circumstances of great public violence or terror are requisite; for it is laid down "that an entry may be said to be forcible, not only in respect of violence actually done to the person of a man, as, by beating him if he refuse to relinquish his possession, but also in respect of any violence in the manner of entry, as, by breaking open the doors of a house, whether any person be in it at the same time or not, especially if it be a dwelling-house." *Hawk. b. 1, c. 64, s. 26*; *State v. Pollock*, 4 Iredell, 305; *Bennett v. State*, 4 Rice, 340. The offence of forcible entry at common law is punishable by fine or imprisonment, in respect to the injury done to the public peace.

(*Forcible entry within the statutes.*) But further to discourage the attempts of parties to assert their claims by violence, statutes were passed in England in very

FORCIBLE ENTRY AND DETAINER.

(492) Forcible entry, etc., into a freehold, on stat. 5 Rich. II.

(493) Forcible entry, into a leasehold, on stat. 21 Jac. I.

(494) Forcible detainer, on stat. 8 Hen. VIII. or 21 Jac. I.

early times, which have been substantially re-enacted in several of the States, not merely to annex punishment to the offence of entering by strong hand on a peaceable possession, but to grant restitution to the party dispossessed, on the conviction of the offender. After, therefore, the statute 5 Richard II. had declared the law "that none should make entry into lands and tenements, but in cases where entry is given by the law, nor, in such cases, with strong hand, nor with multitude of people (ten making a 'multitude;' Co. Lit. 257 a; *R. v. Heine*, cited *Stra.* 195; *Ex parte Davy*, 6 Jur. 949, Wightman, J.), but only in a peaceable and easy manner, on pain of imprisonment and ransom," the statute 15 Rich. II. c. 2, gave a remedy by summary commitment of the offender till fine and ransom; and by 8 Hen. VIII. c. 9, this provision was extended to cases of *forcible detainer*, and justices of the peace were empowered to restore the premises to the former possessor, where the force had been found by a jury summoned by them. *R. v. Harland and others*, 1 P. & D. 33; S. C., 8 A. & E. 826; 2 M. & Rob. 141; *R. v. Hake*, 4 Man. & Ry. 483, n. The inquisition must set forth the estate possessed by the party in the property disputed. *R. v. Bowser*, 8 D. P. C. 128. On these statutes it was doubted whether any but a freeholder could have restitution; and, therefore, the 21 Jac. I. applied the power conferred by the former acts to the restitution of possession of which tenants for terms of years, tenants by copy of court roll, guardians by knight service, and tenants by elegit, statute merchant, or statute staple, had been forcibly deprived; on this account the prosecutor's interest in the premises must be stated in the indictment. *Ld. Kenyon, R. v. Wilson and others*, 8 T. R. 357. Under these acts, therefore, a prosecutor who is a freeholder or leaseholder, etc., may have restitution on conviction of the party of whose dispossession he complains. This restitution may be awarded by the court of quarter sessions, as justices of the peace are expressly empowered to grant it; and in this respect they act as judges of record (3 B. & Ad. 688, *Littledale, J.*); and have greater power than justices of oyer and terminer and gaol delivery, who cannot grant restitution, but can only punish the offender. *Hawk. b. 1, c. 64, s. 61*; *Bac. Abr. Forcible Entry (F)*.

It seems to have been at one time supposed that greater force was necessary to sustain an indictment for forcible entry at common law, than under the statutes (*R. v. Bake*, 3 Burr. R. 1731); but the observations of *Ld. Kenyon*, in *R. v. Wilson*, 8 T. R. 357, seem to negative this distinction, and to place both proceedings on their true ground. "I do not know," said he, "that it has ever been decided that it is necessary to allege a greater degree of force in an indictment at common law for a forcible entry, than in an indictment on the statutes; therefore an indictment at common law, charging the defendants with having entered unlawfully and *with strong hand*, is good;" and *Le Blanc and Lawrence, JJ.*, added that the words *with strong hand* mean something more than *vi et armis*, or a common trespass, viz., the degree of violence amounting to a breach of the public peace, and therefore indictable as forcible entry. See 8 T. R. 361, 363. In truth, there is no good sense in any distinction as to the degree of force indictable in either way; but in neither case will a mere entry by an open door or window, or with a key, however procured, as by trick and contrivance, suffice (*Com. Dig. Forcible Entry (A)*; 3 *Hawk. b. 1, c. 64, s. 26*); nor an entry to which the possessor is induced by threats of destroying his cattle or goods (*Hawk. b. 1, c. 64, s. 25*); but an entry effected by an actual breaking of a dwelling-house, or attended by an actual array of force, will be indictable in either form. The true distinction is, that on an indictment at common law the prosecutor needs only to prove a peaceable possession at the time of the ouster; and that then, as he alleges no title, so he can have no restitution; while in an indictment on the statute of Richard, his interest, viz., a seisin in fee, must be alleged; on the

- (495) Forcible entry. Form in use in Philadelphia. First count, at common law.
 (496) Second count. Entry upon freehold.
 (497) Third count. Entry upon leasehold.
 (498) Breaking and entering a close and cutting down a tree, under the Pennsylvania act.

(489) *General frame of indictment at common law.*

That A. B., late of, etc., C. D., late of, etc., and E. F., late of, etc., together with divers other persons, to the number of six or more, whose names are to the jurors aforesaid as yet unknown, on, etc., with force and arms, and with pistols, staves, and other offensive weapons, etc., into a certain messuage or garden^(b) there situate,^(c) and then^(d) and there being in the peaceable possession^(e) of G. H., unlawfully, violently, and injuriously,

statute of James, the existence of a term or other tenancy; and on these statutes restitution will be granted. 1 Brevard, 119; 1 Greenl. 31. It must be observed, however, that, even on these statutes, proof that the prosecutor holds colorably as a freeholder or leaseholder will suffice; and that the court will not, on the trial, enter into the validity of an adverse claim made by the defendant, which he ought to assert, not by force, but by action. Per Vaughan, B., in *R. v. Williams*, Monmouth Summer Assizes, 1828, Dickinson's Q. S. 378; confirmed on motion for a new trial. And see *Jayne v. Price*, 5 Taunt. 325; 1 Marsh. 68, S. C.; *Dutton v. Tracy*, 4 Conn. 79; *Res. v. Shryber*, 1 Dall. 68; *People v. Anthony*, 4 Johns. 198; *People v. Rickert*, 8 Cow. 226.

See the subject generally examined in Wh. Cr. L. 8th ed. § 1083.

(b) The premises must be described with certainty; and therefore an allegation that the defendant entered a *tenement* will not suffice. 3 Leon. 102; Co. Lit. 6, a; *Torrence v. Com.*, 9 Barr, 184; *Van Pool v. Com.*, 13 Penn. St. 393. The indictment must describe the premises entered, with the same particularity as in ejectment. Thus, an indictment of forcible entry into a messuage, tenement, and tract of land, without mentioning the number of acres, was held bad after conviction. *M'Nair et al. v. Rempulicam*, 4 Yeates, 326. Where the words were, "a certain messuage with the appurtenances, for a term of years, in the district of Spartanburgh," it was adjudged that the place where was not described with sufficient legal certainty. *State v. Walker and Davidson*, Brev. MSS. It is sufficient to describe the premises as "a certain close of two acres of arable land, situate in S. township, in the county of H., being a part of a large tract of land adjoining lands of A. and B." *Dean et al. v. Com.*, 3 S. & R. 418.

In North Carolina the building must be averred to be the "dwelling-house" of A. B., etc. *State v. Morgan*, 1 Wins. (N. C.) 246.

(c) The same particularity is required as under proceedings in ejectment. Wh. Cr. L. 8th ed. § 1109.

(d) See 2 Chit. C. L. 220, 222; 2 Q. B. Rep. 406.

(e) Possession is all that need be laid at common law (*Burd v. Com.*, 6 S. & R. 252; *Res. v. Campbell*, 1 Dall. 354); though upon this averment alone restitution cannot be awarded. See *supra*, note (a), where this point is fully discussed. Cf. Wh. Cr. L. 8th ed. § 1108, etc. Under the statutes either a leasehold or a freehold should be averred. To enforce restitution, one of these is essential. Wh. Cr. L. 8th ed. § 1108.

and with a strong hand,(f) did enter; and that the said A. B., C. D., and E. F., together with the said other persons, then and there, with force and arms, and with a strong hand, unlawfully, violently, forcibly, and injuriously, did expel, amove, and put out, the said G. H. from the possession of the said messuage and garden, and the said G. H., so as aforesaid expelled, amoved, and put out from the possession of the same, then and there, with force and arms and with a strong hand, unlawfully, violently, forcibly, and injuriously have kept out,(g) from the day and year aforesaid until the taking out of this inquisition,(h) and still do keep out, to the great damage of the said G. H., and against, etc. (*Conclude as in book 1, chapter 3.*)

(490) *Another form of same.*(i)

That A. B., etc., on, etc., at, etc., with an axe and auger, unlawfully, violently, forcibly, injuriously, and with a strong hand, did enter into the dwelling house of J. C., in said

(f) These words are vital; greater force must be averred than is expressed by the words *vi et armis*. Wh. Cr. L. 8th ed. § 1107; K. v. Wilson, 8 T. R. 357; Com. v. Shattuck, 4 Cush. 141; State v. Whitfield, 8 Ired. 315. The trespass must involve a breach of the peace, or directly tend to it, as being done in the presence of the prosecutor, to his terror or against his will. State v. Mills, 2 Dev. 420. But see Harding's case, 1 Greenl. 22.

(g) The same description and degree of force is necessary to constitute a forcible detainer as a forcible entry. Dalt. 126; Hawk. b. 1, c. 64, s. 39.

(h) No indictment can warrant an award of restitution, unless it alleges that the wrongdoer both ousted the party aggrieved, and continued in possession at the time of finding the indictment; for it would be a repugnancy to award restitution to one who never was in possession, and vain to award it to one who does not appear to have lost it. Hawk. b. 1, c. 64, s. 41.

(i) This count was sustained in Harding's case, 1 Greenl. 22.

"If the facts charged," said Preble, J., "do not constitute an indictable offence at common law, no sentence can be pronounced upon the defendant.

"The earlier authorities do sanction the doctrine, that at common law, if a man had a right of entry in him, he was permitted to enter with force and arms, when such force was necessary to regain his possession. Hawk. P. C. c. 64, and the authorities there cited. To remedy the evils arising from this supposed defect in the common law, it was provided by statute 5 Rich. II. c. 7, that 'none should make any entry into any lands or tenements but in cases where entry is given by the law; and in such cases, not with strong hand nor with multitude of people but only in a peaceable and easy manner.' The authorities are numerous to show that for a trespass—a mere civil injury, unaccompanied with actual force or violence, though alleged to have been committed with force and arms—an indictment will not lie. But in Rex v. Bathurst, Say. R. 305, the court held, that *forcible entry into a man's dwelling-house* was an indictable offence at common law, though the force was alleged only in the formal words *vi et armis*. In Rex v. Bake, 3 Burr. 1731, it was held, that for a forcible entry an indictment will lie at common law; but actual force must appear on the face of the indict-

and in his actual and exclusive possession and occupation with his family, and the said A. B. did then and there unlawfully, violently, forcibly, injuriously, and with a strong hand, bore into said dwelling-house with said auger, and cut away part of said house, and stove in the doors and windows thereof with said axe, said J. C.'s wife and children being in said house, thereby putting them in fear of their lives, etc.

(491) *Against one, etc., at common law, with no averment of either leasehold or freehold possession in the prosecutor.*(j)

That I. K., at, etc., on, etc., unlawfully, violently, forcibly, and injuriously, did enter into a certain lot of ground and the stable

ment, and is not to be implied from the allegation, that the act was done *vi et armis*. In the *King v. Wilson*, 8 T. R. 357, an indictment at common law charging the defendant with having unlawfully and with a strong hand entered the prosecutor's mill and expelled him from the possession, was held good. In this latter case, Lord Kenyon remarks, 'God forbid these acts, if proved, should not be an indictable offence; the peace of the whole country would be endangered if it were not so.' The case at bar is a much stronger one than either of those cited. The peace of the state would indeed be jeopardized, if any lawless individual destitute of property might, without being liable to be indicted and punished, *unlawfully, violently, and with a strong hand, armed with an axe and auger, forcibly enter a man's dwelling-house, then in his actual, exclusive possession and occupancy with his wife and children—stave in the doors and windows, cutting and destroying, and putting the women and children in fear of their lives.*

"The second objection, that no seisin is alleged, does not apply to indictments for forcible entries at common law. Under the statute of New York against forcible entry, the party aggrieved has restitution and damages; and hence it is necessary that the indictment should state the interest of the prosecutor. The *People v. Shaw*, cited by the defendant's counsel, and the *People v. King*, 2 Caines, 98, are cases upon the statute of that state. In *Rex v. Bake*, Mr. Justice Wilmot remarks: 'No doubt indictments will lie at common law for a forcible entry, though they are generally brought on the acts of parliament. On the acts of parliament it is necessary to state the nature of the estate, because there must be restitution; but they may be brought at common law.' In the *King v. Wilson*, Lord Kenyon says: 'No doubt the offence of forcible entry is indictable at common law, though the statutes give other remedies to the party aggrieved, restitution and damages; and therefore in an indictment on the statutes, it is necessary to state the interest of the prosecutor.' Our statute contains no such provision, and gives no remedy by indictment. It simply provides a process to obtain restitution, leaving the parties, the one to his action for damages, the other to his liability to be indicted and punished at common law.

"With respect to the third objection, it is alleged in the indictment that the house was *Cates' dwelling-house, in his actual and exclusive possession and occupation with his family*, and that the defendant *unlawfully entered*, etc. On the whole we think the indictment contains sufficient matter to warrant a judgment upon the verdict which has been found against the defendant, and the motion in arrest is accordingly overruled."

(j) *Com. v. Kinsman*, Sup. Ct. Pa. Dec. T. 1830, No. 13. Sentence was entered on this indictment after a plea of guilty.

thereon erected, situated between North Alley and South Alley, and between Delaware Fifth and Delaware Sixth streets in the said city, the said lot of ground being forty-nine feet north and south and sixteen feet or thereabouts east and west in dimension, then and there being in the peaceable possession of one T. L., and that the said I. K. then and there, with force and arms and with a strong hand, unlawfully, violently, forcibly, and injuriously did expel, amove, and put out the said T. L. from the possession of the said premises, and the said T. L. so as aforesaid expelled, amoved, and put out from the possession of the same, with force and arms, etc., and with a strong hand, unlawfully, violently, forcibly, and injuriously has kept out, from the day and year aforesaid until the taking of this inquisition, and still doth keep out, and other wrongs to the said T. L. then and there did, to the great damage of the said T. L., to the evil example of all others in the like case offending, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(492) *Forcible entry, etc., into a freehold, on stat. 5 Rich. II.(k)*

That one J. N., etc., at, etc., on, etc., was seized(l) in his demesne as of fee, of and in a certain messuage, with the appurtenances, there situate and being, and the said J. N., being so seized thereof as aforesaid, J. S., late of the parish aforesaid, in the county aforesaid, laborer, afterwards, to wit, on the day and year last aforesaid, in the parish aforesaid, in the county aforesaid, into the said messuage and appurtenances aforesaid, with force and arms and with a strong hand, unlawfully did enter, and the said J. N. from the peaceable possession of the said messuage with the appurtenances aforesaid, then and there, with force and arms and with a strong hand, unlawfully did expel and put out, and the said J. N. from the possession thereof so as aforesaid, with force and arms and with a strong hand, being unlawfully expelled and put out, the said J. S. from the aforesaid third day of August, in the year aforesaid, until the day of the taking of this inquisition, from the possession of the said messuage, with the appurtenances aforesaid, with force

(k) Archbold's C. P. 5th Am. ed. 709.

(l) See *Fitch v. Remplicam*, 3 Yeates, 49; S. C., 4 Dall. 212; *Resp. v. Shryber*, 1 Dall. 68.

and arms and with a strong hand, unlawfully and injuriously then and there did keep out, and still doth keep out, to the great damage of the said J. N., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(493) *Forcible entry into a leasehold, on stat. 21 Jac. I.(m)*

(*Same as in last precedent, adapting the form, however, to a term of years, as thus:*)

That J. N., etc., on, etc., at, etc., was possessed of a certain messuage, with the appurtenances, there situate and being, for a certain term of years, whereof divers, to wit, ten years were then to come, and are still unexpired, and the said J. N. being so possessed thereof, etc. (*as in last precedent.*)

(494) *Forcible detainer, on stat. 8 Hen. VIII. or 21 Jac. I.(n)*

(*The same as in the last two precedents respectively, to the end of the statement of the seisin or possession, then proceed thus:*)

And the said J. N., being so seized (*or possessed*) thereof, J. S., late, etc., into the said messuage, with the appurtenances aforesaid, unlawfully did enter, and the said J. N. from the peaceable possession of the said messuage, with the appurtenances aforesaid, then and there unlawfully did expel and put out, and the said J. N. from the possession thereof, so as aforesaid, being unlawfully expelled and put out, the said J. S. from the said third day of August, in the year aforesaid, until the day of the taking of this inquisition, from the possession of the said messuage, with the appurtenances aforesaid, with force and arms and with a strong hand, unlawfully and injuriously then and there did keep out, and the said messuage with the appurtenances and the possession thereof, then and there unlawfully and forcibly did hold, and still doth hold from the said J. N., to the great damage of the said J. N., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(m) Archbold's C. P. 5th Am. ed. 712. See *Penn. v. Elder*, 1 Smith's Laws, 3.

(n) Archbold's C. P. 5th Am. ed. 712.

(495) *Forcible entry. Form in use in Philadelphia. First count, at common law.*(o)

That A. B., etc, on, etc., at, etc., together with divers other evil disposed persons, to the number of four or more, whose names are to the jurors aforesaid as yet unknown, with force and arms and with a strong hand, unlawfully, violently, forcibly, and injuriously did enter into (*describing premises*), then and there being in the peaceable possession of C. D., and that the said A. B., with the said evil disposed persons, then and there, with force and arms and with a strong hand, unlawfully, violently, forcibly, and injuriously did expel, remove, and put out the said C. D. from the possession of the said premises, with the appurtenances; and the said C. D. so as aforesaid expelled, removed, and put out from the possession of the same, with force and arms and with a strong hand, unlawfully, violently, forcibly, and injuriously have kept out from the same, from the day and year aforesaid, until the taking of this inquisition, and still do keep out; and other wrongs to the said C. D. then and there did, to the great damage of the said C. D., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(496) *Second count. Entry upon freehold.*

That the said C. D., on, etc., at, etc., was seized in his demesne as of fee, of and in the messuage, tenement, and premises hereinbefore specified and described, with the appurtenances thereto; and the said C. D. being so seized thereof as aforesaid, the said A. B. afterwards, to wit, on the day and year aforesaid, at the county and within the jurisdiction aforesaid, into the said messuage, tenement, premises, and appurtenances aforesaid, with force and arms and with a strong hand, unlawfully did enter, and the said C. D. from the peaceable possession of the said messuage, tenement, premises, and appurtenances as aforesaid, then and there, with force and arms and with a strong hand, unlawfully did expel and put out; and the said C. D., from the possession thereof so as aforesaid, with force and arms and with

(o) This form includes a count at common law, and a count on each of the statutes mentioned *supra*, 489, note.

a strong hand being unlawfully expelled and put out, from the day and year aforesaid, until the day of the taking of this inquisition, from the possession of the said messuage, tenement, premises, and appurtenances, with force and arms and with a strong hand, unlawfully and injuriously then and there did keep out, and still do keep out, to the great damage of the said C. D., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(497) *Third count. Entry upon leasehold.*

That the said C. D., on, etc., at, etc., was possessed of the said messuage, tenement, premises, and appurtenances, as hereinbefore described, for a certain term of years, whereof divers, to wit, two years, were then to come, and are still unexpired; and that the said C. D. being so possessed thereof, the said A. B. afterwards, to wit, on the day and year aforesaid, at the county and within the jurisdiction aforesaid, into the said messuage, tenement, premises, and appurtenances as aforesaid, with force and arms and with a strong hand, unlawfully did enter, and the said C. D. from the peaceable possession of the said messuage, tenement, premises, and appurtenances as aforesaid, then and there, with force and arms and with a strong hand, unlawfully did expel and put out; and the said C. D. from the possession thereof so as aforesaid, with force and arms and with a strong hand, being unlawfully expelled and put out, from the day and year aforesaid until the taking of this inquisition, from the possession of the said messuage, tenement, premises, and appurtenances, with force and arms and with a strong hand, unlawfully and injuriously then and there did keep out, and still do keep out, to the great damage of the said C. D., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(498) *For breaking and entering a close and cutting down a tree, under the Pennsylvania act.*

That D. B. and J. T., etc., on, etc., at, etc., into a certain close of the honorable J. H., Esq., situate in the township of Lancaster, and in and upon the possession of the said J. H., Esq., into which the said D. B. and J. T. had not the legal right of entry, did enter, and one oak-tree of the said J. H. then and

there growing, then and there did cut down and fell, they, the said defendants, well knowing the said oak-tree to be growing on the land of the said J. H., and that the land on which the said oak-tree was growing did not belong to them, the said defendants, or either of them, or to any person by whom they, or either of them, were authorized, contrary, etc., and against, etc.(p) (*Conclude as in book 1, chapter 3.*)

(p) This form was sustained by the supreme court of Pennsylvania in *Moyer v. Com.*, 7 Barr, 439. The indictment standing in the place of this in the first edition of this work, is defective. See 4 Am. L. J. 695.

CHAPTER X.

CHEATS.

- I. CHEATS AT COMMON LAW.
- II. FALSE PERSONATION.
- III. SECRETING GOODS WITH INTENT TO DEFRAUD CREDITORS, AND FRAUDULENT CONVEYANCE.
- IV. FRAUDULENT INSOLVENCY IN PENNSYLVANIA.
- V. VIOLATION OF FACTOR LAW.
- VI. OBTAINING GOODS BY FALSE PRETENCE.

I. CHEATS AT COMMON LAW.

- (499) Selling by false weight or measure.
- (500) Against a baker for selling to poor persons loaves under weight, and obtaining pay from them, under the pretence that they were of full weight.
- (501) Cheating at common law, by false cards.
- (502) Second count. Cheating at common law, at a game of dice called "passage."
- (503) Information. Passing a sham bank note, the offence being charged as a false token.
- (504) Obtaining goods by means of a sham bank note, as a misdemeanor at common law.
- (505) Cheat by means of a counterfeit letter.

(499) *Selling by false weight or measure.*(a)

That A. B., late of, etc., on, etc., and from thence until the taking of this inquisition, did use and exercise the trade and

(a) Dickinson's Q. S. 6th ed.
(Cheats at common law generally.) A mere private imposition short of felony, and effected by a "naked lie," without the association of artful device or false token, voucher, order, etc., is not indictable as a cheat at common law, unless it is public in its nature, and calculated to defraud numbers, or to injure the government or the public in general. 1 East, P. C. 817, 821; Dickinson's Q. S. 290; and see 10 A. & E. 37; 2 Per. & Dav. 334. Per Ld. Denman. Forcible illustrations of the distinction between a cheat which becomes indictable or otherwise, as it acquires or loses generality, are found in *Weierbach v. Trone*, 2 Watts & S. 408; and *Com. v. Warren*, 6 Mass. 72. Putting a stone in a single pound of butter, for the purpose of cheating one person, is not an indictable offence; putting a series of stones in a series of pounds of butter, for the purpose of

business of a grocer, and during that time did deal in the buying and selling by weight of (tea, etc.), and of divers other

defrauding the public, is. In other cases prudence and caution would supply sufficient security (1 Hawk. c. 71, s. 2; 2 East, P. C. 818; *R. v. Gibbs*, 1 East, R. 173); but the selling by false weights and measures, though to one person only, or producing false tokens, or taking other like methods to cheat, which cannot be guarded against by ordinary care, was always held indictable offences. *R. v. Young*, 3 T. R. 98, per Butler, J.; *R. v. Wheatly*, 1 Bla. R. 273; 10 A. & E. 37; 2 Burr. 1125, S. C.; *Cross v. Peters*, 1 Greenl. 367; *Com. v. Hearsey*, 1 Mass. 137; *Com. v. Warren*, 6 Mass. 72; *Com. v. Morse*, 2 Mass. 138; *People v. Stone*, 9 Wend. 182; *People v. Miller*, 14 Johns. 371; *People v. Babcock*, 7 Johns. 201; *Lambert v. People*, 9 Cow. 578; *Com. v. Speer*, 2 Va. Cas. 65; *State v. Patillo*, 4 Hawks, 348; *State v. Vaughan*, 1 Bay, 282; *State v. Wilson*, 2 Rep. Con. Ct. 135; *State v. Stroll*, 1 Rich. 244; *Hill v. State*, 1 Yerg. 76; Wh. Cr. L. 8th ed. § 1117.

Such are the following among other frauds. Those affecting the administration of public justice, as counterfeiting a creditor's authority to discharge his debtor from prison (though, if genuine, it would be good), whereby his liberation was effected (*R. v. Fawcitt*, 2 East, P. C. 826, 862); or endangering the public health, by selling unwholesome provisions, unfit for the food of man, whether to the public generally (*R. v. Treeve*, 2 East, P. C. 821), or under a contract with government for supplies to particular bodies, as foreign prisoners of war under the king's protection (*Ib.*); or the military asylum at Chelsea. *R. v. Dixon*, 2 Campb. 12; 3 M. & S. 11, S. C. So in Pennsylvania, an indictment was sustained against a baker in the employ of the United States army, in baking two hundred and nineteen barrels of bread, and marking them as weighing eighty-eight pounds each, when, in fact, they severally weighed but sixty-eight pounds. *Resp. v. Powell*, 1 Dall. 47. See 2 Rep. Con. Ct. 139. But this case can now be considered law (see Wh. Cr. L. 8th ed. § 1119, etc.), only on the ground that a false token was placed by the defendants on the barrels as a mark. To make such cheats indictable at common law a false token or weight must be used. *R. v. Eagleton*, 33 Eng. Law & Eq. 545; 6 Cox C. C. 559. As cheats at common law are regarded frauds calculated to affect all persons, as selling by false weights and measures (*R. v. Wheatly*, 1 Bla. R. 273; *R. v. Young*, 3 T. R. 98; 2 Burr. 1125, S. C., overruling *R. v. Wood*, 1 Sess. Ca. 217); counterfeiting tokens of public authenticity, as the alderman's seal, while those duties remained unrepealed by 11 & 12 Wm. III. c. 20, s. 2 (*R. v. Edwards*, Tremain's P. C. 103); playing with false dice (*R. v. Leaser*, Cro. Jac. 497); obtaining money from a soldier on a false pretence of having power to discharge him (*Serlested's case*, Leach, 202); or getting the king's bounty by enlisting as a soldier, being an apprentice, liable to be retaken by a master. *R. v. Jones*, 2 East, P. C. 822; 1 Leach, 174, S. C. In Virginia the rule has been pressed much further, it having been held that the procuring goods, etc., by means of a note purporting to be a bank note of the Ohio Exporting and Importing Company, there being no such bank or company, is a cheat punishable by indictment at common law, if the defendant knew that it was such a false note. It is necessary in such case to aver the scienter in the indictment. *Com. v. Speer*, 2 Va. Cases, 65; but see *State v. Patillo*, 4 Hawks, 348. So, where the defendants purchased goods from the prosecutor's clerk, and gave in payment an instrument purporting to be a five dollar bill of the Bank of Tallahassee, in Florida, the blanks of which were filled up, except those opposite the words "cashier" and "president;" but in those blanks an illegible scrawl was written, which, on careless inspection, might have been mistaken for the names of those officers, and the defendants knew, before they passed the instrument, that it was worthless; it was held in South Carolina, that

goods, wares, and merchandise, to wit, at, etc., aforesaid; and that the said A. B., contriving and fraudulently intending to cheat and defraud the people of the said state, whilst he used and exercised his said trade and business, to wit, etc., and on divers other days and times between that day and the day of taking of this inquisition, at, etc., did knowingly, wilfully, falsely, fraudulently, and deceitfully keep in a certain shop there, wherein he the said A. B. did so as aforesaid carry on his said trade, a certain false pair of scales^(b) for the weighing of goods, wares, and merchandises by him sold in the way of his said trade, which said scales were then and there, by artful and deceitful contrivance, so made and constructed as to cause every quantity of goods, wares, and merchandises weighed therein and

they were guilty, at common law, of cheating by a false pretence. *State v. Stroll*, 1 Rich. 244.

The following are some instances of frauds on individuals, which, not being effected in the course of general practice, or by means generally calculated to injure the public, are not indictable at common law: selling a smaller as and for a larger quantity of an article, if without using false weights or measures; this being a deception which could not have taken effect but for the buyer's carelessness in accepting without measure (*R. v. Wheatly*, 2 Burr. 1125 (the beer case); *Cowp.* 324; *East*, P. C. 817, 819); or inducing an illiterate person to sign a deed by reading it to him falsely. *State v. Justice*, 2 Dev. 199. The like where a miller who had received good barley to grind, delivered in return meal of musty and unwholesome barley, or of barley mixed with other grain, but not for the food of man, and the mill not being a soke mill, to which certain residents were obliged to resort to grind their corn. *R. v. Haynes*, 4 M. & S. 220. See 6 *East*, 133. So as to obtaining money of A., by pretending to come by command of B. to receive money (*R. v. Jones*, 2 Ld. Raym. 1013; *Salk.* 379; 6 *Mod.* 105, S. C.; see 2 *East*, P. C. 818; 1 *Hawk. c.* 71, s. 2); or detaining part of corn sent to be ground. *Channel's case*, *Stra.* 793. On the same principle, it is not an indictable offence to get possession of a note, under pretence of wishing to look at it, and carrying it away and refusing to return it (*People v. Miller*, 14 *Johns.* 37); nor to obtain money by falsely representing a spurious note of hand to be genuine (*State v. Stroll*, 1 Rich. 244; *State v. Patillo*, 4 *Hawks.* 348; see *Com. v. Speer*, 2 Va. Cases, 65); nor to pretend to have money ready to pay a debt, and thereby obtaining a receipt in discharge of the debt, without paying the money (*People v. Babcock*, 7 *Johns.* 201); nor to put a stone in a pound of butter so as to increase its weight (*Weierbach v. Trone*, 2 *Watts & S.* 408); nor to obtain goods on credit, by falsely pretending to be in trade, and to keep a grocery shop, and giving a note for the goods, in a fictitious name (*Com. v. Warren*, 6 *Mass.* 72); nor to obtain, in violation of an agreement and by false pretences, possession of a deed lodged in a third person's hands as an escrow. *Com. v. Hearsey*, 1 *Mass.* 137. See *Wh. Cr. L.* 8th ed. §§ 1119 *et seq.*

(b) The fraudulent instrument must be specified. It is not enough to say "by certain false devices," etc. 2 *East*, P. C. c. 18, s. 18; *R. v. Closs*, D. & B. 460. To charge as a "common cheat" is plainly inadequate. *State v. Johnson*, 1 *Chipman*, 120. But it is not necessary to set forth the devices used more specially than they appeared to the party cheated at the time, and then to aver their falsity. *Ibid.*; *Wh. Cr. L.* 8th ed. § 1129.

sold thereby, to appear of greater weight than the real and true weight, by one tenth part of such apparent weight; and that the said A. B., on, etc., aforesaid, at, etc., aforesaid (he the said A. B. then and there well knowing the said scales to be false as aforesaid), did knowingly, wilfully, and fraudulently sell and utter to one C. D.,^(c) a citizen of the said state, certain goods in the way of his said trade, to wit, a large quantity of tea, weighed in and by the said false scales, and as and for ten pounds weight of tea, whereas, in truth and in fact, the weight of the said tea, so sold as aforesaid, was short and deficient of the said weight of ten pounds, by one tenth part of the said weight of ten pounds, to wit, at, etc., aforesaid, against, etc. (*Conclude as in book 1, chapter 3.*)

(500) *Against a baker for selling to poor persons loaves under weight, and obtaining pay from them, under the pretence that they were of full weight.*^(d)

That heretofore, to wit, on the twenty-first day of January, 1854, at the parish of Great Yarmouth, in the borough of Great Yarmouth, and within the jurisdiction of this court, J. Eagleton, of the parish aforesaid, in the borough aforesaid, baker, unlawfully, knowingly, and designedly, did falsely pretend to one William Christmas Nutman, then being relieving officer of the said parish of Great Yarmouth, that he the said John Eagleton had, on the day and year last aforesaid, supplied and delivered to one Samuel Lingwood, he being a poor person of the said parish, two loaves of bread, and that each of the said two loaves of bread then weighed three pounds and one half of a pound, by means of which said false pretence the said John Eagleton did then and there unlawfully attempt and endeavor, fraudulently, falsely, and unlawfully, to obtain from the guardians of the poor of the said parish, a sum of money, to wit,

(c) It is better to aver a particular person defrauded, though it seems enough, if such be the fact, to allege the sale to have been to divers citizens unknown. 2 Stark. C. P. 467. That the person defrauded must be named, see *State v. Woodson*, 5 Humph. 55. But that does not apply to cases of using false weights or tokens with intent to cheat the public. *R. v. Gibbs*, 8 Mod. 58; *R. v. Closs*, D. & B. 460, and observations in Wh. Cr. L. 8th ed. § 1128. In any view the party cheated may be averred as a "person unknown."

(d) This count was sustained in *R. v. Eagleton*, 33 Eng. L. & Eq. 545; 6 Cox, C. C. 559.

the sum of 1s. of the moneys of the said guardians, with the intent thereby then and there to defraud ; whereas, in truth and in fact, the said two loaves of bread did not each weigh, nor did either of them weigh, three pounds and one half of a pound ; against the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity.

(501) *Cheating at common law, by false cards.(e)*

That A. B. *et al.*, being persons of dishonest conversation, and common gamblers and deceivers, with false dice and cards, on, etc., at, etc., contriving, practising, and falsely, fraudulently, and deceitfully intending one A. S., with false cards and false play, falsely, unlawfully, unjustly, fraudulently, and deceitfully to deceive and defraud, and from the said A. S., by means of the said false cards and false play, craftily and subtly, falsely, fraudulently, and deceitfully, different sums of money to acquire and obtain, then and there did solicit, incite, provoke, and procure the said A. S. to play with them, the said A. B. *et al.*, at a certain unlawful game, called whist, for divers sums of money, by means whereof the said A. S. did then and there play with the said A. B., etc., at the said unlawful game, called whist, for divers sums of money, and that the said A. B. *et al.* did then and there, with force and arms, at the said unlawful game, called whist, by means of false cards and false play, subtly, falsely, unlawfully and fraudulently receive, have, and obtain into their own hands and possession, the sum of eighty pounds of lawful moneys of the said A. S. and from the said A. S., and the same did then and there carry away, to the great damage, etc., and against, etc.(f) (*Conclude as in book 1, chapter 3.*)

(502) *Second count. Cheating at common law, at a game of dice called "passage."*

That the defendants, being such persons as aforesaid, on, etc., at, etc., did solicit, incite, provoke, and procure the said A. S. to play with them, the said A. B. *et al.*, at a certain unlawful game, called passage, for divers sums of money, by means whereof the

(e) Stark. C. P. 444.

(f) R. v. Arnope, Trem. 91 ; and see R. v. Betsworth, Trem. 93.

said A. S. did then and there play with the said A. B. *et al.*, at the said unlawful game, called passage, for divers sums of money, and that the said A. B. *et al.* did then and there, with false dice, and by false throwing of the same, that is to say, by slurring the said dice, subtly, falsely, unlawfully, and fraudulently receive, have, and obtain into their own hands and possession, the sum of eighty pounds of the lawful moneys of the said A. S. and from the said A. S., and the same did then and there carry away, to the great damage, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(503) *Information. Passing a sham bank note, the offence being charged as a false token.*(g)

D. K., attorney to the state of Connecticut, for the county of New Haven, now here in court, information makes that G. B. S., of the town of New Haven, in the county of New Haven, on, etc., did wilfully and designedly, and with intent to cheat and defraud one F. W. I., of said town of New Haven, utter and pass, to the said F. W. I., as money, a certain false token made and executed after the general similitude of a bill of a banking company intended as money, and purporting to be a bank bill of the denomination of five dollars, and to have been issued by a banking company or corporation in the state of New York, by and under the name of "The Globe Bank," and purporting also to be signed by N. B., as president, and to be countersigned by S. D. D., as cashier thereof; which false token is of the following purport and effect, that is to say (*here set out the token or bill*); whereby and by means of said false token the said G. B. S. did then and there knowingly and fraudulently obtain from the said F. W. I., certain goods, the property of the said F. W. I., that is to say, one pair of boots, of the value of five dollars; whereas, in truth and in fact, at the time when said false token was so uttered and passed to the said F. W. I., no such banking company or corporation existed in the state of New York as "The Globe Bank," nor did such banking company or corporation ever have existence in said state of New York, nor was

(g) On this information, which was drawn by Mr. Kimberly, a leading lawyer of New Haven, afterwards United States senator from Connecticut, the defendant was convicted and sentence passed.

there at the time when said false token was uttered and passed to the said F. W. I. as aforesaid, or at any other time, any banking company or corporation in the state of New York known by or doing business under the name of "The Globe Bank," but said pretended bank bill, and pretended signatures thereto, were and are wholly false, fictitious, and fraudulent. All which is to the great damage and deception of the said F. W. I., against, etc., and contrary, etc.

Whereupon the attorney prays the advice of this honorable court in the premises.

(504) *Obtaining goods by means of a sham bank note, as a misdemeanor at common law.*

That J. S., etc., on, etc., at, etc., falsely and deceitfully did obtain and get into his hands and possession, from one T. C., three yards of velvet, etc., of the value in the whole of nine dollars eighty-seven and a half cents, of the goods and chattels, wares and merchandise of the said T. C., and bank notes and money of the said T. C. to the further amount of ten dollars and twelve and a half cents, by color and means of a certain false note and token, purporting to be a bank note for twenty dollars, issued and purporting to be payable on demand by the Ohio Exporting and Importing Company, at their bank in Cincinnati, and purporting to be subscribed by one Z. S., president, and countersigned by J. L., cashier, and which said false note the said T. C. believed to be a true bank note for twenty dollars; and that he the said J. S. did thereby and therefor procure the said T. C. then and there to deliver to him the said J. S. the goods and chattels, wares, merchandise, bank notes and money of him the said T. C. aforesaid, he the said J. S. then and there well knowing the said note to be false and fraudulent as aforesaid, to the great injury and deception of him the said T. C., to the evil example, etc., and contrary to the form of the statute, etc.(h) (*Conclude as in book 1, chapter 3.*)

(h) *Com. v. Speer*, 2 Va. Cases, 65. The prisoner was convicted, but, before judgment was rendered, the court below adjourned to general court the following questions: 1. Is the falsely passing as a true note a false and forged note purporting to be a note of the Bank of the Ohio Exporting and Importing Company, and purporting to be signed and payable as in the indictment is set forth, and procuring the goods and other property in the indictment mentioned for the said

(505) *Cheat by means of a counterfeit letter.*(i)

That J. G., etc., on, etc., at, etc., a certain false and counterfeit letter, in the name of a certain T. G., of the township aforesaid, farmer, to a certain B. D., in the township of Plymouth, in the said county, merchant, directed, falsely and deceitfully contrived, made, imagined, and devised, the tenor of which said false and counterfeit letter follows in these words, to wit:—

“New Providence, December 25th, 1755. Friend B. D., let the bearer, J. G., have half a gallon of rum; he is going down the road a little way, and at his return send me half a gallon home by him, and I will pay you; the latter end of next week I shall go to town. T. G.”

And afterwards, to wit, the day and year aforesaid, at Plymouth township aforesaid, in the county aforesaid, the said false and counterfeit letter to the aforesaid B. D. falsely and deceitfully did give and deliver, by color and means of which said false and counterfeit letter, so as aforesaid to the said B. D. delivered, the said J. G., the day and year aforesaid, at Plym-

false and forged note, when no such bank or company ever existed, either chartered or unchartered, such a false token or counterfeit letter as comes within the true intent and meaning of the act of assembly, passed November, 1789, and if so, is the indictment in this case good and sufficient? 2 If this is not an offence within the act of assembly, is it an indictable offence at common law, and if so, can judgment be given against the defendant upon this indictment, that he be imprisoned, the jury not having assessed a fine?

Per Curiam: “The court is unanimously of opinion, that the falsely passing as a true note a false and forged note purporting to be a note on the Bank of the Ohio Exporting and Importing Company, and purporting to be signed and payable as in the indictment is set forth, and procuring the goods and other property in the indictment mentioned for the said false and forged note, when no such bank or company ever existed, either chartered or unchartered, is not such an offence as can be prosecuted under the act entitled ‘An act against those who counterfeit letters or privy tokens, to receive money or goods in other men’s names,’ passed November 18, 1789.

“And the court is further unanimously of opinion, that the offence of falsely procuring the goods, etc., of other men by means of a false and counterfeit note, such as is set forth in the indictment, knowing the same to be false and counterfeit, is indictable as a cheat at common law; but that judgment cannot be rendered against the defendant in this case, because the indictment does not expressly aver that the said defendant knew that the said note was a false and fraudulent note.”

The count in the text has been amended by the insertion of the scienter required by the court, though, even as thus qualified, it is questionable, whether a more full averment of the invalidity of the notes would not be advisable.

(i) This indictment was framed in 1756, by Benjamin Chew, then attorney-general of Pennsylvania.

outh township aforesaid, in his hands and possession, one half gallon of rum of and from the aforesaid B. D. falsely, unlawfully, unjustly, and deceitfully did acquire and obtain, and the said B. D. then and there of the aforesaid one half gallon of rum falsely, unlawfully, unjustly, and deceitfully did deceive and defraud, to the evil and pernicious example of all others in such case delinquent, and against, etc. (*Conclude as in book 1, chapter 3.*)

II. FALSE PERSONATION.

(506) *Under 11 Geo. IV. and 1 Wm. IV. c. 66, s. 11.(j)*

That J. S., late, etc., on, etc., at, etc., before the right honorable Sir J. P., knight, one of the barons of Her Majesty's court of exchequer, at Westminster (the said Sir J. P., knight, then and there having lawful authority to take any recognizance of bail in any suit then depending in the said court), then and there feloniously did acknowledge a certain recognizance of bail, in the name of J. N., in a certain cause then depending in the said court, wherein A. B. was plaintiff, and C. D., defendant, he, the said J. N., not being then and there privy or consenting to the said J. S. so acknowledging such recognizance in his name as aforesaid, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(506a) *Personating a seaman, under English statute.*

The jurors for our lady the queen, upon their oath present, that J. S., on the first day of August, in the year of our Lord , in order to receive certain pay then payable by the admiralty ("any pay, wages, allotment, prize money, bounty money, grant, or other allowance in the nature thereof, half-pay, pension, or allowance from the compassionate fund of the navy, payable, or supposed to be payable by the admiralty, or any other money so payable or supposed to be payable, or any effects or money in charge or supposed to be in charge of the admiralty") did unlawfully, falsely, and deceitfully personate one J. N., a person then entitled, or supposed to be entitled, to receive the same pay ("any person entitled, or supposed to be entitled, to receive the same"); against, etc.(k)

(j) Arch. C. P. 7th Am. ed. 478.

(k) Arch. C. P. 19th ed. 667.

III. SECRETING GOODS, ETC.

- (507) Secreting, etc., with intent to defraud, etc.
- (508) Second count. Same, with intent to defraud and prevent such property from being made liable for payment of debts.
- (509) Third count. Same, not specifying property.
- (510) Fourth count. Averring intent to defraud persons unknown.
- (511) Fifth count. Same, not specifying goods, with intent to defraud persons unknown.
- (512) Sixth count. Same, with intent to prevent property from being levied on.
- (513) Another form on the same statute. First count, intent to defraud, to prevent property being made liable, etc.
- (514) Second count. Same, with intent to defraud another person.
- (515) Third count. Secreting, assigning, etc., with intent to defraud two, etc.
- (516) Fourth count. Secreting, etc., averring creditors to be judgment creditors.
- (517) Fifth count. Same, in another shape.
- (518) Fraudulent conveyance under Stat. Eliz. ch. 5, s. 3.

(507) *First count. Secreting, etc., with intent to defraud, etc.*(*l*)

That A. K., etc., on, etc., at, etc., being a person of an evil disposition, ill name and fame, and of dishonest conversation, and

(*l*) The 26th section of the act abolishing imprisonment for debt in New York (Laws of 1831, 402), and the 20th section of the act under the same title in Pennsylvania (Pamph. Laws, 1842, 339; Purd. 585), make it penal in a debtor to secrete his goods with intent to defraud his creditors. The precedent in the text has been several times sustained in New York, though it has not yet received a final adjudication in the Pennsylvania courts. In New York, the question came up in *People v. Underwood* (16 Wend. 546). In that case exception was taken, because it was neither averred nor proved that the prosecuting creditors were judgment creditors. Bronson, J., in noticing this position, said: "The 26th section of the statute, under which the defendant was indicted, declares that 'any person who shall remove any of his property out of any county with intent to prevent the same from being levied upon by any execution, or who shall secrete, assign, convey, or otherwise dispose of any of his property with intent to defraud any creditor, or to prevent such property being made liable for the payment of his debts, and any person who shall receive such property with such intent, shall, on conviction, be deemed guilty of a misdemeanor.' The language of the act plainly extends to all creditors, and I can perceive no sufficient reason for restricting its construction to such creditors as have obtained judgments for their demands. The fraudulent removal, assignment, or conveyance of property by a debtor, which the legislature intended to punish criminally, usually takes place in anticipation of a judgment, and for the very purpose of defeating the creditor of the fruits of his recovery. If there must first be a judgment before the crime can be committed, the statute will be of very little public importance. This is not like the case of a creditor seeking a *civil remedy* against a fraudulent debtor. There the creditor must complete his title by judgment and execution, before he can control the debtor in the disposition of his property; he must have a certain

unlawfully devising and intending to defraud A. C. R. and H. B., merchants, doing business in the city of New York, under the name, style, and firm of R. and B., said firm of R. and B. being creditors of him the said A. K., on, etc., at, etc., unlawfully did secrete, assign, convey, and dispose of^(m) the personal property of him the said A. K., to wit, etc. (*stating goods, as in larceny*), with intent to defraud the said firm of R. and B., then and there being creditors of him the said A. K., to the great damage of the said A. C. R. and H. B., doing business as aforesaid under the name, style, and firm of R. and B., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(508) *Second count. Same, with intent to defraud and prevent such property from being made liable for payment of debts.*

That the said A. K., further devising and intending to defraud the said A. C. R. and H. B., doing business under the name, style, and firm of R. and B., so being creditors as aforesaid of him the said A. K., afterwards, to wit, on the day and year aforesaid, with force and arms, at the ward, city, and county aforesaid, wickedly, fraudulently, and unlawfully did secrete, assign, convey, and dispose of certain other property of him the said A. K., to wit, etc., with intent then and there to defraud the said A. C. R. and H. B., doing business under the name, style, and firm of R. and B. as aforesaid, and then and there being creditors of him the said A. K., and to prevent such property being made liable for the payment of the debts of him the said A. K., to the great damage of the said A. C. R. and H. B., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

claim upon the goods before he can inquire into any alleged fraud on the part of the debtor. *Wiggins v. Armstrong*, 2 Johns. Ch. 144. But this is a public prosecution, in which the creditor has no special interest. The legislature has relieved the honest debtor from imprisonment, and subjected the fraudulent one to punishment as for a criminal offence. The crime consists in assigning or otherwise disposing of his property with intent to defraud a creditor, or to prevent it from being made liable for the payment of his debts. The public offence is complete, although no creditor may be in a condition to question the validity of the transfer in the form of a civil remedy. I think the jury were properly instructed on this question, and that the exception should be overruled." See *Wh. Cr. L.* 8th ed. § 1239.

As to the extent of "creditors" in the act, see *Johnes v. Potter*, 5 S. & R. 519, where it was held that the word included not only persons whose debts are due and payable, but those whose debts are not yet due.

(m) See *supra*, notes to form 2, as to this joinder.

(509) *Third count. Same, not specifying property.*

That the said A. K., on, etc., at, etc., fraudulently, wickedly, and unlawfully did secrete, assign, convey, and otherwise dispose of his property, with intent to defraud the said A. C. R. and H. B., then and there being creditors of him the said A. K., and then and there doing business under the name, style, and firm of R. and B., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(510) *Fourth count. Averring intent to defraud persons unknown.*

That the said A. K., being a person of an evil disposition (*as in the first count mentioned*), further devising and intending to defraud divers other persons to the jurors aforesaid unknown, creditors of him the said A. K., afterwards, to wit, on the said fourth day of April, in the year aforesaid, with force and arms, at the ward, city, and county aforesaid, fraudulently, wickedly, and unlawfully did secrete, assign, convey, and otherwise dispose of (*stating goods*), of the property of him the said A. K., with intent then and there to defraud divers persons to the jurors aforesaid unknown, then and there being creditors of him the said A. K., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(511) *Fifth count. Same, not specifying goods, with intent to defraud persons unknown.*

That the said A. K., afterwards, on, etc., at, etc., wickedly, fraudulently, and unlawfully did secrete, assign, convey, and otherwise dispose of his property, with intent to defraud divers other persons to the jurors aforesaid unknown, then and there being creditors of him the said A. K., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(512) *Sixth count. Same, with intent to prevent property from being levied on.*

That the said A. K., afterwards, on, etc., at, etc., wickedly, fraudulently, and unlawfully did secrete, assign, convey, and otherwise dispose of his property, to prevent such property being

made liable for the debts of him the said A. K., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(513) *Another form on the same statute. First count, intent to defraud to prevent property being made liable, etc.(n)*

That R. B., etc., on, etc., at, etc., wickedly, fraudulently, and unlawfully devising and intending to defraud I. C. F., the said I. C. F. being then and there a creditor of him the said R. in a large amount, to wit, four thousand dollars, of his just debt so as aforesaid due from him the said R. to him the said I., did then and there fraudulently, wickedly, and unlawfully secrete (*goods as in larceny*), being then and there the property of the said R., with intent to defraud the said I., being as aforesaid a creditor of the said R., and to prevent the said specified goods and chattels and property of the said R. being made liable for the payment of the debt aforesaid, so as aforesaid due from him the said R. to the said I., to the great damage of the said I., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(514) *Second count. Same, with intent to defraud another person.*

That the said R. B., on, etc., wickedly, fraudulently, and unlawfully devising and intending to defraud J. P. B., the said J. P. B. being then and there a creditor of him the said R. in a large amount, to wit, four thousand dollars, of his just debt so as aforesaid due from him the said R. to him the said J. P. B., did then and there fraudulently, wickedly, and unlawfully secrete two hundred pressing plates, two screws, twenty shafts, two hundred wooden frames, one horse, one wagon, being together of the value of two thousand dollars, being then and there the property of the said R., with intent to defraud the said J. P. B., being as aforesaid a creditor of the said R., and to prevent the said specified goods and chattels and property of the said R. being made liable for the payment of the debt as aforesaid, so as aforesaid due from him the said R. to the said J. P. B., to the great damage of the said J. P. B., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(n) This indictment was drawn in 1847, by Mr. David Webster, then assistant of the attorney-general of Pennsylvania, but was never tried.

(515) *Third count. Secreting, assigning, etc., with intent to defraud two, etc.*

That the said R. B., on, etc., at, etc., wickedly, fraudulently, and unlawfully devising and intending to defraud I. C. F. and J. P. B., the said F. and B. being then and there creditors of him the said R. in large amounts, to wit, in the sum of eight thousand dollars, of their respective just debts, so as aforesaid due from the said R. to them the said F. and B., did then and there wilfully, wickedly, unlawfully, and corruptly secrete, assign, convey, and dispose of the property, goods, wares, and merchandises, and moneys of him the said R., of great value, to wit, of the value of ten thousand dollars, the character, quality, quantity, description, and denomination of which said goods, property, wares, and merchandises, and moneys are to the inquest unknown, with intent to defraud the said I. C. F. and J. P. B., so being creditors of the said R., and to prevent the said property, goods, wares, and merchandises, and moneys being made liable for the payment of the debts of the said R., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(516) *Fourth count. Secreting, etc., averring creditors to be judgment creditors.*

That on, etc., J. S., J. L., and L. H., trading as S., L., and H., were creditors of the said R. B. by judgment, which said judgment was entered in favor of them the said J. S., J. L., and L. H., trading as aforesaid, against him the said R., in the district court for the city and county of Philadelphia, at the September term of the said court, in the year one thousand eight hundred and forty-six, being numbered two hundred and fifty-seven of the said term, for the sum of seven thousand nine hundred dollars, and was founded on a certain bond and warrant of attorney thereto annexed, executed by the said R. B. in favor of them the said J. S., J. L., and L. H., trading as S., L., and H., dated the twenty-fourth day of October, one thousand eight hundred and forty-six, in the penal sum of seven thousand nine hundred dollars, conditioned for the payment of the just sum of three thousand nine hundred and fifty dollars on demand, with lawful interest, which said judgment still remains on the records of the

said courts unpaid and unsatisfied; and the inquest, etc., on their oaths, etc., do further present, that the said R. B., on, etc., at, etc., wickedly, fraudulently, and unlawfully devising and intending to defraud the said J. S., J. L., and L. H., trading as S., L., and H., the said J. S., J. L., and L. H., trading as S., L., and H., being then and there judgment creditors of him the said R. B., as aforesaid set forth, of their just debt and judgment so as aforesaid due from him the said R. to them the said S., L., and H., trading as aforesaid, did then and there wilfully, wickedly, unlawfully, and corruptly, secrete the goods and chattels in the aforesaid first, second, and third counts mentioned and referred to, being then and there the property of the said R., with intent to defraud the said J. S., J. L., and L. H., trading as aforesaid, being as aforesaid the judgment creditors of him the said R. B., and to prevent the said goods and chattels being made liable for the payment of the aforesaid debt and judgment so as aforesaid due from the said R. to the said J. S., J. L., and L. H., trading as aforesaid, to the great damage of the said J. S., J. L., and L. H., trading as aforesaid, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(517) *Fifth count. Same in another shape.*

That the said R. B., on, etc., at, etc., wickedly, fraudulently, and unlawfully devising and intending to defraud J. S., J. L., and L. H., trading as S., L., and H., the said S., L., and H., trading as aforesaid, being then and there judgment creditors of the said R., to wit, by a judgment entered in the district court for the said city and county wherein they the said J. S., J. L., and L. H., trading as aforesaid, were plaintiffs, and the said R. was defendant, which said judgment was for a large sum of money, to wit, seven thousand nine hundred dollars, and is number two hundred and fifty-seven on the docket of the September term of the said court for the year one thousand eight hundred and forty-six, of their just debt and judgment so as aforesaid due from him the said R. to them the said S., L., and H., did then and there wilfully, wickedly, unlawfully, and corruptly secrete, assign, convey, and dispose of the property, goods, wares, and merchandises, and moneys of him the said R., of great value, to wit, of the value of ten thousand dollars, the

character, quality, quantity, description, and denomination of which said goods, property, wares, and merchandises, and moneys are to the inquest unknown, with intent to defraud the said J. S., J. L., and L. H., trading as aforesaid, so being judgment creditors of him the said R., and to prevent the said property, goods, wares, and merchandise, and wares and moneys being made liable for the payment of the debts of the said R., and of the aforesaid judgment, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(518) *Fraudulent conveyance under Stat. Eliz. ch. 5, s. 3.(o)*

That heretofore, and before, etc., of the offence hereinafter next mentioned, to wit, on the first day of January, in the year of our Lord 1850, and on divers other days and times heretofore, William Smith, hereinafter mentioned, had committed and caused to be committed near to and in the neighborhood of certain, to wit, twenty-two, messuages, of and belonging to one T. C. M., to wit, at West Hill Grove, in the parish of Battersea, in the county of Surrey, divers nuisances and injurious acts, matters, and things, to the great damage and injury of the said T. C. M., to wit, to the amount of £300 and upwards. Wherefore the said T. C. M. heretofore, to wit, on the twenty-seventh day of January, in the year of our Lord 1851, did commence a certain action on the case against the said W. S., to wit, in the court of our lady the queen, before the queen herself, whereby to recover from the said W. S. the lawful damages sustained by the said T. C. M. for and in respect of the said nuisances and injurious acts, matters, and things aforesaid.

That thereupon such proceedings were had and taken in the said action, that afterwards, to wit, at the assizes holden at Kingston-on-Thames, in and for the county of Surrey aforesaid, the said action came on to be tried, and then and there, before

(o) This indictment was sustained in *R. v. Smith*, 6 Cox C. C. 31. It has been thought right, says Mr. Cox, to set out this indictment at some length, as it is the only form of the kind to be found in the books. It was drawn, after much consideration, by the deputy clerk of assize on the home circuit, and is believed to be the only instance in which an attempt has been made to render this section the basis of a criminal prosecution—a fact somewhat remarkable, considering the extensive nature of its operation. The facts of the case are sufficiently shown by the indictment itself. On this topic see Steph. Dig. Cr. Art. 388; Brett, *ex parte*, L. R. 1 Ch. D. 151.

the Right Honorable John Lord Campbell, and the Right Honorable Sir James Parke, knight, then and there being her majesty's justices assigned to take the assizes in and for the said county, was by a certain jury of the country in due form of law tried, upon which said trial the said jury did find and say upon their oaths, that the said W. S. was guilty of the grievances, nuisances, and injurious acts, matters, and things aforesaid; and assessed the damages of the said T. C. M. on occasion thereof, over and above his costs and charges by him about his said suit in that behalf expended, to £300, and assessed those costs and charges at forty shillings.

That during the pendency of the said suit, to wit, from the commencement of the said suit until the twenty-eighth day of March, in the year of our Lord 1851, the said W. S. was seized in his demesne as of fee of and in certain lands, hereditaments, and premises within the said county, to wit, at the parish of Battersea, in the county of Surrey.*

That the said W. S., late of the parish of Wandsworth, in the county aforesaid, laborer, and S. Everett, late of the same place, laborer, devising and wickedly intending and contriving to injure, prejudice, and aggrieve the said T. C. M., and to defraud and deprive him of any damages and costs to be recovered in the said action, whilst the same was so pending as aforesaid, and immediately before the same came on for trial as aforesaid, and in anticipation of the said verdict, to wit, on the day and year last aforesaid, at the parish last aforesaid, in the county aforesaid, did devise, contrive, and prepare, and caused to be prepared, a certain feigned, covinous, and fraudulent alienation and conveyance, whereby the said W. S. expressed and declared to appoint and grant to the said S. E. the lands, tenements, and hereditaments aforesaid, to hold to him the said S. E. and his heirs forever.

That the said W. S. and S. E., wickedly and fraudulently devising, contriving, and intending as aforesaid, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, knowingly, wilfully, fraudulently, covinously, and injuriously did execute and become parties to the said alienation and conveyance, and then and there wittingly and wilfully did put in ure, avow, maintain, justify, and defend the same alienation

and conveyance, as true, simple, and done and made *bonâ fide* and upon good consideration, and as a conveyance and alienation whereby the said W. S. had really and *bonâ fide* appointed and granted to the said S. E. the lands, tenements, and hereditaments aforesaid, to hold to him the said S. E. and his heirs forever. Whereas, in truth and in fact, the said alienation and conveyance was not nor is it *bonâ fide*. And whereas the truth was and is, that the same was so devised, contrived and executed as aforesaid, of malice, fraud, collusion, and guile, and to the end, purpose, and intent to delay and hinder the said T. C. M. of and in his said just and lawful action and the said damages by reason of the premises; to the great let and hinderance of the due course and execution of law and justice, to the great injury of the said T. C. M., against the form of the statute in such case made and provided, and against the peace of our said lady the queen, her crown and dignity.

Second count, as in the first count to the asterisk, and continued thus :

That the said W. S. and S. E., devising and wickedly intending and contriving to injure, prejudice, and aggrieve the said T. C. M., and to defraud and deprive him of any damages and costs to be recovered in the said action whilst the same was so pending as aforesaid, and immediately before the same came on for trial as aforesaid, and in anticipation of the said verdict, to wit, on the day and year last aforesaid, at the parish of Wandsworth, in the county aforesaid, did devise, contrive, and prepare, and cause to be prepared, a fraudulent alienation and conveyance of the lands, tenements, and hereditaments aforesaid. That the said W. S. and S. E., wickedly and fraudulently devising, contriving, and intending as aforesaid, on the day and year aforesaid, at the parish last aforesaid, in the county aforesaid, unlawfully, knowingly, wilfully, fraudulently, covinously, and injuriously did execute and become parties to the said alienation and conveyance, and then and there wittingly and willingly did put in ure, avow, maintain, justify, and defend the same alienation and conveyance, as true, simple, and done and made *bonâ fide* and upon good consideration, and as a conveyance and alienation, whereby the said W. S. had really and *bonâ fide* aliened and

conveyed to the said S. E. the lands, tenements, and hereditaments aforesaid, to hold to him the said S. E. and his heirs forever; whereas, in truth, etc. (*as in first count*).

Third count, as in the first count to the asterisk :

That during the pendency of said action, and in anticipation of the said verdict, to wit, on the day and year last aforesaid, a certain feigned, covinous, and fraudulent alienation and conveyance had been devised, contrived, prepared, and executed, by and between the said W. S. and the said S. E., whereby the said W. S. was expressed and declared to appoint and grant and make over to the said S. E., the lands, tenements, and hereditaments aforesaid, to the said S. E. and his heirs forever. That the said W. S. and S. E., wickedly devising, contriving, and intending to injure, prejudice, and aggrieve him, and to deprive him of the said damages and costs in the said action so found as aforesaid, afterwards, to wit, on the twenty-sixth day of April, in the year of our Lord 1851, at the parish of Wandsworth, in the county aforesaid, unlawfully, wittingly, and willingly did put in ure, avow, maintain, justify, and defend the same alienation and conveyance, as true, simple, and done and made *bonâ fide* and upon good consideration, and as a conveyance and alienation, whereby the said W. S. had really and *bonâ fide* appointed, granted, and made over to the said S. E. the lands, tenements, and hereditaments aforesaid, to hold to him the said S. E. and his heirs forever; whereas, in truth and in fact, etc.

Fourth count, as in the first count to the asterisk :

That during the pending of the said action, and in anticipation of the said verdict, to wit, on the day and year last aforesaid, a certain feigned, covinous, and fraudulent alienation and conveyance had been devised, contrived, prepared, and executed by and between the said W. S. and the said S. E., of the lands, tenements, and hereditaments aforesaid, to the said S. E. and his heirs forever. That the said W. S. and S. E., wickedly devising, contriving, and intending to injure, prejudice, and aggrieve the said T. C. M., and defraud and deprive him of the said damages and costs in the said action so found as aforesaid, afterwards, to wit, on the twenty-sixth day of April, in the year of our Lord

1851, at the parish of Wandsworth aforesaid, in the county aforesaid, unlawfully, wittingly, and willingly did put in ure, avow, maintain, justify, and defend the same alienation and conveyance, as true, simple, and done and made *bonâ fide* and upon good consideration, and as a conveyance and alienation whereby the said W. S. had really and *bonâ fide* granted, bargained, aliened, released, conveyed, and made over to the said S. E. the lands, tenements, and hereditaments aforesaid, to hold to him the said S. E. and his heirs forever, etc.

Fifth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. S. and the said S. E., and divers evil disposed persons, wickedly intending to injure the said T. C. M., on the twenty-eighth day of March, in the year of our Lord 1851, with force and arms, at the parish of Wandsworth, in the county aforesaid, did amongst themselves conspire, combine, confederate, and agree together, fraudulently, maliciously, and covinously to delay, hinder, and defraud the said T. C. M. of all such damages which he might thereafter recover against the said W. S. in a certain action which was then pending in the court of our said lady the queen, before the queen herself, wherein the said T. C. M. was plaintiff, and the said W. S. was defendant, to the evil example of all others in the like case offending, against the peace of our said lady the queen, her crown, and dignity.

Sixth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. S. and the said S. E., and divers evil disposed persons, wickedly intending to injure the said T. C. M., on the twenty-eighth day of March, in the year of our Lord 1851, with force and arms, at the parish of Wandsworth, in the county aforesaid, did amongst themselves conspire, combine, confederate, and agree together, fraudulently, maliciously, and covinously to delay, hinder, and defraud the creditors of the said W. S., to the evil example of all others in the like case offending, against the peace of our lady the queen, her crown, and dignity.

Seventh count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. S. and the said S. E., and divers evil disposed persons, wickedly intending to injure the said T. C. M., on the twenty-eighth day of March, in the year of our Lord 1851, with force and arms, at the parish of Wandsworth, in the county aforesaid, did amongst themselves conspire, combine, confederate, and agree together, fraudulently, maliciously, and covinously to cheat and defraud the said T. C. M. of the fruits and of all benefits and advantages of any execution or executions which he might thereafter lawfully issue or cause to be issued against the lands or tenements of the said W. S., to the evil example of all others in the like case offending, against the peace of our lady the queen, her crown, and dignity.

Eighth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. S. and the said S. E., and divers evil disposed persons, wickedly intending to injure the said T. C. M., on the twenty-eighth day of March, in the year of our Lord 1851, with force and arms, at the parish of Wandsworth, in the county aforesaid, did amongst themselves conspire, combine, confederate, and agree together, fraudulently, maliciously, and covinously to cheat, injure, impoverish, prejudice, and defraud the said T. C. M., to the evil example of all others in the like case offending, etc.

Ninth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, and before and at the time of the commission of the offence hereinafter next mentioned, to wit, on the twenty-eighth day of March, in the year of our Lord 1851, a certain action on the case was pending between the said W. S. and the said T. C. M., to wit, in her majesty's court of queen's bench, at Westminster, whereby the said T. C. M. sought to recover from the said W. S. damages for certain nuisances and injurious acts, matters, and things alleged to have been done and committed to the injury of the said T. C. M. That the

said W. S. and S. E., and divers evil disposed persons, whilst the said action was so pending as aforesaid, to wit, on the day and year aforesaid, at the parish last aforesaid, in the county aforesaid, unlawfully and wickedly did conspire, combine, confederate, and agree together, by divers unlawful, false, fraudulent, and indirect ways, means, devices, stratagems, and contrivances, to impede, hinder, prevent, and delay the said T. C. M. in the said action, and in the prosecution thereof, and in the recovery of damages for the nuisances and injurious acts, matters, and things aforesaid, to the great injury of the said T. C. M., against the form of the statute in such case made and provided, and against the peace of our said lady the queen, her crown, and dignity. (p)

(p) After conviction, Locke (for the defence) moved in arrest of judgment, on the ground that no proceeding by indictment was contemplated by the statute. The third section was in these words: "That all and every the parties to such feigned, covinous, or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, and other things before expressed, and being privy and knowing of the same, or any of them, which, at any time after the tenth day of June, next coming, shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same, or any of them, as true, simple, and done, had, or made *bona fide*, and upon good consideration, or shall aliene or assign any the lands, tenements, goods, leases, or other things before mentioned, to him or them conveyed as is aforesaid, or any part thereof, shall incur the penalty or forfeiture of one year's value of the said lands, tenements, and hereditaments, leases, rents, commons, or other profits, of or out of the same, and the whole value of the said goods and chattels, and also of so much moneys as are or shall be contained in any such covinous or feigned bond; the one moiety whereof to be to the queen's majesty, her heirs, and successors, and the other moiety to the party or parties aggrieved by such feigned and fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases, rents, commons, profits, charges, and other things aforesaid, to be recovered in any of the queen's courts of record, by action of debt, bill, plaint, or information, wherein no essoign, protection, or wager of law shall be admitted to the defendant or defendants, and also, being thereof lawfully convicted, shall suffer imprisonment for one half year, without bail or mainprize." The offence, if any, of which the defendants have been guilty, is entirely created by this statute, and the section, after stating what the offence is, declares that for committing it the offender shall incur a penalty or forfeiture of one year's value, to be recovered by action. There is no mention whatever of indictment, but there is a reference to a civil proceeding. The rule with respect to the mode of proceeding where new offences are created by statute is laid down in Russell on Crimes, p. 50, in the following terms: "Where an offence was punishable by a common law proceeding before the passing of a statute which prescribes a particular remedy by a summary proceeding, then either method may be pursued, as the particular remedy is cumulative, and does not exclude the common law punishment. But where a statute creates a new offence by prohibiting and making unlawful what was lawful before, and appoints a particular remedy against such new offence, by a particular sanction and particular method of proceeding, such method must be pursued, and no other. The mention of other methods of pro-

IV. FRAUDULENT INSOLVENCY IN PENNSYLVANIA.

- (519) General form.
- (520) Averring collusion with another person.
- (521) Same, but averring collusion with another person.
- (522) Same, specifying another assignee.
- (523) Fraudulent insolvency by a tax collector. First count. Embezzling creditor's property.
- (524) Second count. Applying to his own use trust money, etc.

(519) General form.

That T. W. D., etc., on, etc., at, etc., made and presented to the honorable the judges of the court of common pleas of the

ceeding impliedly excludes that by indictment, unless such methods are given by a separate and substantive clause." There is another objection to this indictment, that it only states generally that this deed was fraudulent, not stating why or in what respect it was so. In *re Peck*, 9 Adolphus & Ellis, 686, it was held, that a count charging that the defendants unlawfully conspired to defraud divers persons who should bargain with them for the sale of merchandise, of great quantities of such merchandise, without paying for the same, with intent to obtain to themselves money and other profit, was bad for not showing by what means the parties were to be defrauded.

James (with whom was Hawkins), for the prosecution, was not called upon.

Maule, J. "As to the first point, that the section of the act of parliament does not speak of indictment, I think it clear that that proceeding is the proper one. The section mentions the offence, and then, with reference to the punishment, declares that the 'offender, being thereof convicted, shall suffer imprisonment for one half year.' That must mean, 'being convicted thereof' before some competent tribunal. If the statute had pointed out some other means—for instance, on conviction before a justice of the peace, on a summary hearing—it would probably have restricted proceedings to that particular course. It is true that the statute does mention a civil action, but that has nothing whatever to do with the half year's imprisonment, but merely has reference to the recovery of damages by action, in any of the courts at Westminster. It surely could never be contended that the meaning of the statute is, that, when such a court has given judgment for the damages, it should proceed to award to the defendant the punishment of imprisonment for half a year. The humanity of our law has established a clear distinction between civil and criminal proceedings, and this act of parliament cannot be supposed to sanction so anomalous a course as that. It is obvious that, by some means or another, imprisonment is to be awarded after a proper conviction before a recognized tribunal. How, then, can that be done otherwise than by indictment?"

Locke submitted, that, at all events, it was intended that no criminal proceeding should be resorted to until after the recovery of damages in a civil action; the words "and also," near the end of the section, seemed to point to such a construction.

Maule, J. "I do not think so; those words do not necessarily so restrict the procedure, and there seems to be no reason why it should be so restricted. Then, as to the second point, the case cited is one where persons were said to have conspired to do a thing not necessarily unlawful in itself—such as, for instance, preventing a person from having execution of a judgment. There is nothing unlawful in that. It is precisely what the learned counsel, and those who in-

county of Philadelphia, his petition in writing praying for the benefit of the insolvent laws of this commonwealth, according to the form, force, and effect of the said insolvent laws,* and the said T. W. D. so petitioning as aforesaid, and being then and there indebted to a certain B. L., of the said county, yeoman, and also to divers others, whose names are to the jurors aforesaid unknown, in divers large sums of money, the said court on the said petition, so presented as aforesaid, did then and there appoint the eleventh day of January, in the year of our Lord one thousand eight hundred and thirty-nine, for the purpose of hearing the said T. W. D. and his creditors, at the county court-house in the city of Philadelphia, on which said last mentioned day, and at the court-house aforesaid, and on the several days and times thereafter to which the said case was duly adjourned, to wit, at the county aforesaid, the said court did meet and sit, for the purpose aforesaid [and it appearing to the said court on the said hearings that there was just ground to believe that the said T. W. D. had concealed part of his estate and effects, and colluded and contrived with divers persons for such concealment, and conveyed the same to divers persons for the use of himself and his family and friends, with the expectation of receiving some future benefit to himself and them, with intent to defraud his creditors, the said court on the said (*stating time*) did commit the said T. W. D. to the jail of the said county, for trial at this court.] And the inquest aforesaid do further present, that the said T. W. D., fraudulently and wickedly contriving and intending to cheat and defraud the said B. L. and others, his creditors as aforesaid, to wit, on the day and year first aforesaid, at the city and county aforesaid, did collude and contrive with a certain J. B. D. and a certain C. W. D. for the concealment of a part of his the said T. W. D.'s estate and effects, to wit, merchandise, consisting of groceries,† viz., one hundred chests of tea; dry goods, viz., five thousand yards of domestic goods; hardware, and other articles to the jurors aforesaid unknown, of great value, to wit, of the value of one hundred thousand dollars, thereby

struct him, are doing at this moment, seeking to prevent the operation of a judgment by arresting it. In the present case, the very words of the statute are adopted. What is charged, therefore, is necessarily unlawful, for the statute has made it so." Judgment for the crown.

expecting a future benefit to himself, with intent to defraud the said B. L. and others, his creditors, to the evil example of all others in like cases offending, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

*Second count. Same as first down to *, and then proceed:*

And the said T. W. D. was then and there indebted to B. L., J. R., and D. M., of the said city and county, yeoman, and also to divers others, whose names are to the jurors aforesaid unknown, in divers large sums of money, and that the said T. W. D., so petitioning as aforesaid (with the result aforesaid), did, with intent to defraud his creditors aforesaid, convey to a certain J. B. D. and C. W. D., for the use of himself, the said T. W. D., thereby expecting a future benefit to himself, part of his estate and effects, to wit, merchandise, consisting of groceries, etc. (*Conclude as in first count from †.*)

(520) *Third count. Same as first, but averring collusion with another person.*

Fourth count.

That the said T. W. D., on, etc., at, etc., made and presented to the honorable the judges of the court of common pleas of the county of Philadelphia his petition in writing, praying for the benefit of the insolvent laws of the commonwealth of Pennsylvania, and that the same T. W. D., so petitioning as aforesaid (with the result aforesaid), on the day and year first aforesaid, at the city and county aforesaid, did fraudulently* convey to a certain T. W. D., Jr., part of the estate, effects, and credits of said T. W. D., to wit, merchandise, consisting of groceries, viz., one hundred chests of tea; dry goods, viz., five thousand yards of cotton goods; hardware, and other articles to the jurors aforesaid unknown, of great value, to wit, of the value of twenty thousand dollars, with the expectation of receiving future benefit to himself, and with intent to defraud his creditors and for the use of himself, to the evil example, etc.

(521) *Fifth and sixth counts. Same as first, but averring collusion with another person.*

(522) *Seventh count. Same as second, but specifying another assignee.*

*Eighth count. Same as fourth to *, and then proceed :*

conceal part of his estate, effects, and credits, to wit, merchandise, consisting of groceries, one hundred chests of tea; dry goods, viz., five thousand yards of cotton domestic goods; and other articles to the jurors aforesaid unknown, of great value, to wit, of the value of fifty thousand dollars, with the expectation of receiving future benefit to himself, and with intent to defraud his creditors, and for the use of himself, to the evil example, etc.(q)

(523) *Fraudulent insolvency by a tax collector. First count, embezzling creditor's property.*

That E. N. F., etc., on, etc., at, etc., made and presented to the honorable the judges of the court of common pleas of the county of Philadelphia his petition in writing, praying for the benefit of the insolvent laws of this commonwealth, according to the form, force, and effect of the said insolvent laws, and the said E. N. F., so petitioning as aforesaid, being then and there indebted to the county of Philadelphia in a large sum of money, to wit, in the sum of ten thousand dollars, being the same sum of money embezzled as hereinafter mentioned, and also to divers others, whose names are to the jurors aforesaid unknown, in divers large sums of money to the jurors aforesaid unknown, the said court, on the said petition so presented as aforesaid, did then and there appoint the third day of November, one thousand eight hundred and forty-seven, for the purpose of hearing the said E. N. F. and his creditors, at the county court-house, in the city of Philadelphia, on which said last mentioned day, and at the

(q) This is the indictment in Dyott's case, on which the defendant was convicted and sentenced, and the judgment sustained in the supreme court of Pennsylvania. *Com. v. Dyott*, 5 Whart. 67. The allegations in brackets in the first count are not in the original form, but are here introduced in consequence of a judgment of the court of quarter sessions in Philadelphia, in *Com. v. McCabe*, June 7, 1854, in which they were held necessary.

court-house aforesaid, and on the several days and times thereafter to which the said case was duly adjourned, to wit, at the county aforesaid, the said court did meet and sit, for the purpose aforesaid. [And it appearing to the same court on the said hearings that there was just ground to believe that the said E. N. F. had concealed part of his estate and effects, and colluded and contrived with divers persons for such concealment, and conveyed the same to divers persons for the use of himself and his family and friends, with the expectation of receiving some future benefit to himself and others, and with intent to defraud his creditors, the said court on the said (*stating time*) did commit the said E. N. F. to the jail of the said county, for trial at the court.] And the inquest aforesaid, on their oaths and affirmations aforesaid, do further present, that theretofore, to wit, on the day and year first aforesaid, at the county and within the jurisdiction aforesaid, he the said E. N. F.* being then and there the agent of the said county of Philadelphia, unlawfully embezzled divers large sums of money, to wit, ten thousand dollars, the property of said county, with which said sums of money he had been intrusted as agent aforesaid, by the said county of Philadelphia, to the prejudice of the said county of Philadelphia, the said county being then and there a creditor of him the said E., and opposing his petition aforesaid, as well as of the other opposing creditors of said E., with intent to defraud the said county of Philadelphia, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(524) *Second count. Applying to his own use trust money, etc.*
*Same as in first count to *, and then proceed :*

being then and there the agent of the county of Philadelphia, and intrusted as such with divers large sums of money, to wit, ten thousand dollars, the property of said county, unlawfully applied to his own use the said money, to the prejudice of the said county of Philadelphia, the said county being an opposing creditor of him the said E., at the hearing aforesaid, as well as of the other opposing creditors of the said E., with intent to defraud the said county, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Third count. Same, differently stated. As in first count to, and proceed :*

being then and there the agent of the county of Philadelphia, unlawfully embezzled and applied to his own use divers large sums of money, to wit, ten thousand dollars, the property of said county, with which said money he had been intrusted as agent aforesaid, by the said county of Philadelphia, to the prejudice of the said county, the said county being creditor of the said E., opposing his petition as aforesaid, as well as of the other opposing creditors of the said E., with intent to defraud the said county, contrary, etc. (*Conclude as in book 1, chapter 3.*)

Fourth count. Embezzlement, etc. ; the appointment as collector being more fully set forth.

That the said E. N. F., on, etc., at, etc., was duly constituted and appointed collector of taxes for the county of Philadelphia, in South Ward in the city of Philadelphia, and being so constituted and appointed, he the said E. then and there exercised the said office of collector of taxes, and was intrusted with and collected divers large sums of money in his capacity as collector and agent as aforesaid for the said county, said money belonging to said county. And the inquest aforesaid, on their oaths and affirmations aforesaid, do further present, that afterwards, to wit, on the day and year first aforesaid, at the county and within the jurisdiction aforesaid, he, etc., made and presented to the said judges of the court of common pleas his petition in writing (the effect of which in the first count of this indictment is more particularly set forth), he the said E. being then and there indebted to the said county of Philadelphia, in the sum of money embezzled as hereinafter mentioned, and also to divers others, whose names are to this inquest unknown ; whereupon the said court took such action on said petition, and such proceedings were thereon had therein as in the first count of this indictment is described. And the inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that afterwards, to wit, on the day and year first aforesaid, at the county and within the jurisdiction aforesaid, the said E. N. F., being such collector of taxes and agent as aforesaid for the said county of Philadelphia,* unlaw-

fully embezzled divers large sums of money, to wit, ten thousand dollars, being part of the said money which he had collected as collector of taxes and agent as aforesaid for the county of Philadelphia, said money being the property of the said county, to the prejudice of the said county, the said county being an opposing creditor of the said E. at the hearing aforesaid, as well as of the other opposing creditors of said E., with intent to defraud the said county, contrary, etc. (*Conclude as in book 1, chapter 3.*)

*Sixth count. State the office, etc., as in fifth count to *, and proceed:*

unlawfully applied to his own use divers large sums of money, to wit, ten thousand dollars, being the said money with which he had been intrusted as collector aforesaid, and agent for the said county of Philadelphia, said money being the property of the said county, to the prejudice of the said county, the said county being an opposing creditor of the said E. at the hearing aforesaid, as well as of other opposing creditors of said E., with intent to defraud the said county, contrary, etc. (*Conclude as in book 1, chapter 3.*)

Seventh count. Same as sixth, introducing the averment that the money embezzled was part of the money which had been intrusted to the collector.

*Eighth count. Colluding, etc. Same as first count to *, and then proceed:*

And the said E. N. F., fraudulently and wickedly contriving and intending to cheat and defraud the said county of Philadelphia, and others, his creditors aforesaid, to wit, on the day and year first aforesaid, at the city and county aforesaid, did collude and contrive with certain persons whose names are to this inquest as yet unknown, for the concealment of a part of his estate and effects, to wit, money of the value of ten thousand dollars, thereby expecting further benefit to himself, with intent to defraud the said county of Philadelphia, and others, his creditors, to the evil example of all others in like manner offending, contrary, etc. (*Conclude as in book 1, chapter 3.*)

V. VIOLATION OF FACTOR LAW.

(525) Pledging goods consigned, and applying the proceeds to defendant's use, under the Pennsylvania statute.

(526) Second count. Selling same, and applying to defendant's use the proceeds.

(527) Third count. Selling same for negotiable instrument.

(525) *First count. Pledging goods consigned, and applying the proceeds to defendant's use, under the Pennsylvania statute.*

That J. Q. A., etc., and D. S. H., on, etc., at, etc., then and there being the factors and consignees of a certain C. D., with force and arms, etc., did then and there receive as a consignment for sale from the said C. D. certain goods and merchandise, to wit (*stating the goods with the same particularity as in larceny*), together with other goods and merchandise of the goods and property of the said C. D., in all of great value, to wit, of the value of one thousand four hundred and two dollars, and that the said J. Q. A. and D. S. H., so being such consignees and factors as aforesaid, on the day and year as aforesaid, at the county aforesaid, and within the jurisdiction aforesaid, with force and arms, etc., in violation of good faith and with intent to defraud the said C. D., did then and there deposit and pledge with one J. B.(r) said merchandise, so consigned to them as aforesaid, as a security for certain money, to wit, the sum of one thousand four hundred and two dollars, which they the said J. Q. A. and D. S. H. had before that time borrowed from the said J. B., and did then and there apply and dispose of to their own use the said money, to the great damage of the said C. D., to the evil example of all others in the like case offending, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(526) *Second count. Selling same, and applying to defendant's use the proceeds.*

That the said J. Q. A. and D. S. H., on, etc., then and there being the consignees and factors of the said C. D., with force and arms, etc., did then and there receive from the said C. D., as a consignment for sale, certain other goods and merchandise, to

(r) If the party from whom the money was borrowed, and to whom the property was pledged, be unknown, it can be averred so.

wit, etc., of the goods and property of the said C. D., and that the said J. Q. A. and D. S. H., so being such consignees and factors as last aforesaid, on the day and year last aforesaid, at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., in violation of good faith, and with intent to defraud the said C. D., did then and there sell the last mentioned goods and merchandise to one B. C., at and for the sum of one thousand four hundred and two dollars, and apply and dispose of to their own use, the said sum of one thousand four hundred and two dollars so received, to the great damage of the said C. D., to the evil example of all others in like case offending, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(527) *Third count. Selling same for negotiable instrument.*

That the said J. Q. A. and D. S. H., on, etc., then and there being the consignees and factors of the said C. D., with force and arms, etc., did then and there receive from the said C. D., as a consignment for sale, certain other goods and merchandise, to wit, of the goods and property of the said C. D.,* and that the said J. Q. A. and D. S. H., so being such consignees and factors as last aforesaid, on the day and year last aforesaid, at the county aforesaid, with force and arms, etc., in violation of good faith, and with intent to defraud the said C. D., did sell the said last mentioned goods and merchandise to one A. B., at and for the price and sum of one thousand four hundred and two dollars, and received therefor as such consignees the negotiable instruments of the purchasers of said last mentioned goods and merchandise, whose names are as yet unknown to the inquest aforesaid, and with force and arms, etc., and in violation of good faith, and with intent to defraud the said C. D., did then and there apply and dispose of to their own use the said negotiable instruments raised and acquired by the sale of the said last mentioned goods and merchandise of the said C. D., to the evil example of others in like case offending, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

*Fourth count. Same as third to *, and proceed :*

and did then and there undertake and faithfully promise the said C. D. to sell the said last mentioned goods and merchandise for and on account of him the said C. D., and to render him a just and true account of said last named sale, and well and truly to pay to the said C. D. the proceeds thereof according to their duty as such consignees and factors as last aforesaid, but that the said J. Q. A. and D. S. H., so being such consignees and factors as last aforesaid, on the day and year last aforesaid, at the county aforesaid, with force and arms, etc., in violation of good faith and with intent to defraud the said C. D., did then and there sell to one A. B. the last named goods and merchandise at and for the price and sum of one thousand four hundred and two dollars, and did then and there apply and dispose of to their own use the said last named sum of one thousand four hundred and two dollars raised by the sale of the last named goods and merchandise, to the great damage of the said C. D., to the evil example of all others in like case offending, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Fifth count. Same stated in another shape.

That the said J. Q. A. and D. S. H., on, etc., then and there being the consignees and factors of the said C. D., with force and arms, etc., in violation of good faith and with intent to defraud the said C. D., did apply and dispose of for their own use certain other money, to wit, the sum of one thousand four hundred and two dollars, which said last mentioned sum of money had before that time been raised and acquired by them the said J. Q. A. and D. S. H., by the sale of certain other goods and merchandise, to wit (*stating the goods*), of the goods and property of the said C. D., which said last named goods and merchandise had been before that time consigned for sale to them the said J. Q. A. and D. S. H. by the said C. D., to the great damage of the said C. D., to the evil example of others in like case offending, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

OFFENCES AGAINST PROPERTY.

VI. OBTAINING GOODS BY FALSE PRETENCES.(s)

(528) General frame of indictment.

(529) Form used in Massachusetts.

(530) Same in New York.

(531) Pretence that defendant was agent of a lottery, etc.

(s) See Wh. Cr. L. 8th ed. § 1130, on the subject generally.

In connection with this topic, the following observations may be of use:—

It will be noticed at the outset, that in their operative clauses, the statutes in England and in Massachusetts, New York, and Pennsylvania, are the same. See Wh. Cr. L. 8th ed. § 1130. Keeping this in mind, the general definition afforded by the cases both in England and this country is, that a false pretence must be a false representation as to some existing fact, made for the purpose of inducing the prosecutor to part with his property, and not a mere promise, which the prisoner intends to break, as for payment of goods on delivery. *R. v. Goodhall*, R. & R. 461; *R. v. Parkes*, 2 Leach 616; *Com. v. Drew*, 19 Pick. 184; *Com. v. Hutchinson*, 2 Pa. L. J. 242; *Com. v. Stone*, 4 Met. 48; *Com. v. Wilgus*, 4 Pick. 177. Thus, where an indictment stated the false pretence to be, that the prisoner would tell the prosecutor where his strayed horse was, if he would give him one pound, without alleging that the prisoner pretended he knew where it was, it was held bad, though the prisoner received the money, and refused to tell. *R. v. James Douglass*, 1 Mood. C. C. 462. But it has been held that obtaining money as a share of a bet, on a fraudulent representation that it had been laid, though to be decided by the future event of a pedestrian feat, is a false pretence. *R. v. Young*, 3 T. R. 98. It is not necessary to constitute the offence, as was thought in New York (*People v. Conger*, 1 Wheel. C. C. 449), that the prisoner should, orally, or in writing, make any false assertion; for if he present a genuine order for the payment of money, and assumes by his conduct to be the person to whom it is payable, and by this means fraudulently obtains money which belongs to another, he will be within the statute. *R. v. Story*, R. & R. 81. Thus where a party not being a member of the University of Oxford, went into a shop there, wearing the academic cap and gown, and obtained goods, his dress was held a sufficient false pretence, though nothing passed in words. *R. v. Barnard*, 7 C. & P. 784; Wh. Cr. L. 8th ed. § 1170. Another instance in which the acts and conduct of a party were held tantamount to a false pretence, without false verbal representations, was that where a party obtained goods and money in exchange for a counterfeit promissory note, by asking for goods at a shop, and at the same time throwing down, as in payment, the note in question, which purported to be of larger value than the price of the goods, without stating it to be genuine. *R. v. Freeth*, R. & R. 127. [In this case the first and second counts were on the statute for false pretence; the third was for a cheat at common law. Against the last count, it was argued that a note for less than twenty shillings being void and prohibited by law, it was no offence to forge it (as to which point see *Rushworth's case*, R. & R. 318), or to obtain money on it when forged, as the party to whom it was uttered ought to have been on his guard; *Graham, B.*, however, left the case to the jury, directing them, that the evidence, if true, sustained the second and third counts. Verdict, guilty on both those counts. The judges were of the opinion stated above, which appears, in substance, confined to the second count; but *Lawrence, J.*, thought the shopkeeper not cheated if he parted with his goods for a piece of paper, which, being a promissory note for less than twenty shillings, he must be presumed in law to know was worth nothing, if genuine.] Where, however, goods were obtained by means of a forged order in writing, requesting the prosecutor to let the bearer have linen for J. R., and signed J. R., this is reported to have been held by *Taunton, J.*, to

FALSE PRETENCES.

(532) Obtaining money by personating another.

(533) Pretence that defendant was M. H., who had cured Mrs. C. at the Oxford Infirmary, whereby he induced the prosecutor to buy a bottle of ointment, etc., for which he received a sovereign, giving 15s. in change.

be uttering a forged request for delivery of goods, and a felony under 1 Wm. IV. ch. 66, s. 19 (*R. v. Evans*, 5 C. & P. 553); whereas, obtaining money from a county treasurer by a forged note purporting to be signed by a magistrate, for paying the expenses of conveying vagrants, had been held a false pretence in *R. v. Rushworth*, R. & R. 317; 1 Stark. C. P. 396, S. C.

Obtaining goods by giving in payment a check on a banker with whom the party keeps no cash, and which he knows will not be paid, is indictable as a false pretence, though not an indictable fraud at common law. *R. v. Lara*, 6 T. R. 565; *R. v. Hunt*, R. & R. 460. In a false pretence of this kind, it was held to be well laid, "that the check was a good and genuine order for the payment of, and of the value of, the sum specified." *R. v. Parker*, 2 Mood. C. C. 1. A count alleged the prisoner to have obtained from G. P. by a false pretence (stated), a sovereign, "with intent to defraud G. P. of the sum of five shillings, parcel of the value of the last-mentioned piece of the current gold coin." Prisoner was shown to have made the pretence laid, viz., that he was Mr. H., and thereby induced G. P. to buy, at the cost of five shillings, a bottle of stuff he said would cure G. P.'s child. G. P. gave him a sovereign, and received fifteen shillings in change. Prisoner was shown not to be H.; held to be a false pretence, and with intent well laid. *R. v. Bloomfield*, C. & M. 537. See *infra*, 533. Wh. Cr. L. 8th ed. §§ 1183, 1184, 1200. A false statement to a parish officer as an excuse for not working, that the party has not clothes, is not a false pretence within the act, though it induce the officer to give him clothes, as it was rather an excuse for not working than a false pretence to obtain goods. *R. v. Wakeling*, R. & R. 504; Wh. Cr. L. 8th ed. §§ 1173, 1193.

Obtaining money by a pretence, known by the offender to be false at the time, is equally criminal, though the party who parted with the money laid a plan to entrap him into committing the offence. *R. v. Ady*, 7 C. & P. 140. See Wh. Cr. L. 8th ed. § 149.

In the cases which have occurred in this country, the same rules are applied. Thus, where one under a fictitious name delivered to a person to sell on commission spurious lottery tickets, purporting to be signed by himself, and received from the agent the proceeds of the sale (*Com. v. Wilgus*, 4 Pick. 177); where a keeper of an intelligence office, by falsely pretending he had a situation in view, induced the prosecutor to pay him two dollars as a premium (*Com. v. Parker*, Thacher's C. C. 24); where the defendant falsely pretended to the prosecutor that a horse he was about to sell him was the horse "Charley," whereas he was not that horse, but another of equal worth (*State v. Mills*, 17 Maine R. 211); where a person obtained goods under the false pretence that he lived with and was employed by A. B., who sent him for them (*People v. Johnson*, 12 Johns. 292; *Lambert v. People*, 9 Cow. 578); where the defendant represented himself to be in a successful business as a merchant in Boston, with from \$9000 to \$10,000 over and above all his debts, and to give weight to this assertion, represented that he had never had a note protested in his life, and had then no indorsers; where in one count the pretence was, "that he, the said J. A. B., possessed a capital of \$8000, that the said \$8000 had come to him through his wife, it being her estate, and that a part of it had already come into his possession, a part would come into his possession in the month then next ensuing, and that for the remaining part thereof he would be obliged to wait for a short time;" and in the second count, that he, the said J. A. B., possessed a capital of \$8000, which said \$8000 had come to him through his wife, it being her estate;"

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- (534) Against a member of a benefit club or society, for obtaining money belonging to the rest of the members, under false pretences.
- (535) Another form for same, coupled with a production to the society of a false certificate of burial.
- (536) First count. Pretence that a broken bank note was good.
- (537) Pretence that a flash note was good.
- (538) Pretence that a worthless check or order was good.
- (539) Another form for same.
- (539a) Pretence that a certificate of stock was genuine.
- (540) Obtaining goods by a check on a bank where the defendant had no funds.
- (540a) Another form of same.
- (541) Pretence that defendant was the agent of A. B., and as such had been sent by A. B. to C. D., to receive certain money due from the latter to the former.
- (541a) Pretence that defendant had been sent for certain goods.
- (541b) Pretence that defendant was broker for undisclosed principal.
- (542) Pretending to be clerk of a steamboat, and authorized to collect money for boat.
- (543) Pretence made to a tradesman that defendant was a servant to a customer, and was sent for the particular goods obtained.
- (544) Another form for same.
- (544a) Pretence that defendant was asked by "a person living in a large house down the street" to buy carpet of prosecutor.
- (545) Pretence that the defendant was entitled to grant a lease of certain freehold property.
- (546) Pretence that the defendant was authorized agent of the executive committee of the exhibition of the Works of Industry of all Nations, and that he had power to allot space to private individuals for the exhibition of their merchandise.
- (547) Pretence that prisoner was an unmarried man, and that, having been engaged to the prosecutrix, and the engagement broken

and in a third, "that he was possessed of \$8000" (*Com. v. Burdick*, 2 Barr, 163); where the defendant pretended to the prosecutor that the goods to be purchased were ordered for a hotel-keeper in Washington, who was a man of credit, and to whom they were to be immediately forwarded (*Com. v. Spring*, cited 3 Pa. L. J. 89); where the pretence was that the defendant owned real estate in Passyunk Road worth \$7000, and that he had personal property and other means to meet his liabilities, and that he was in good credit at the Philadelphia Bank (*Com. v. M'Crossin*, 3 Pa. L. J. 219); where the indictment charged that N. represented to O. that he possessed four valuable negroes, and that he would let him have them for four bills of exchange on Philadelphia, and that in consequence of this representation, the bills were drawn by O., and that this representation was made knowingly and designedly, and with intent to cheat O. of his drafts, and that, in fact, N. possessed no such slaves as he pretended to have (*State v. Newell*, 1 Mo. R. 177);—in all these cases, there was held to be the false representation of an existing fact, and that the exigencies of the statute therefore were satisfied. For a full enumeration see Wh. Cr. L. 8th ed. § 1130 *et seq.*

FALSE PRETENCES.

- off, he was entitled to support an action of breach of promise against her, by which means he obtained money from her.
- (547a) Pretence that a certain coat was a particular uniform.
- (548) Pretence that defendants were the agents of P. N., who was the owner of certain stock and land, etc., the latter of which was in fact mortgaged.
- (549) That defendant possessed a capital of eight thousand dollars, which had come to him through his wife, it being her estate, and that a part of it had already come into his possession, and a part would come into his possession in the month then next ensuing, etc.
- (550) Second count. That defendant had a capital of \$8000, which came through his wife.
- (551) Third count. That defendant had a capital of \$8000.
- (552) Pretence that defendant was well off and free from debt, etc.
- (553) Second count. Setting forth the pretence more fully.
- (554) Pretence that certain property of the defendant was unincumbered, and that he himself was free from debts and liabilities.
- (554a) Pretence that certain goods were unincumbered.
- (555) Pretence that defendant had then purchased certain property, which it was necessary he should immediately pay for.
- (556) Pretence that a certain draft for \$7700, drawn by a house in Charleston on a house in Boston, which the defendant exhibited to the prosecutor, had been protested for non-payment; that the defendant had had his pocket cut, and his pocket-book containing \$195 stolen from it; that a draft drawn by a person in Philadelphia, which the defendant showed the prosecutor, had been received by the defendant in exchange for the protested draft, and that the defendant expected to receive the money on the last-mentioned draft.
- (556a) Pretence that defendant had half of certain bank notes.
- (557) Pretence that a certain watch sold by defendant to prosecutor was gold.
- (557a) Pretence that a chain was gold.
- (558) Obtaining money by means of a false warranty of the weight of goods.
- (559) Obtaining money by a false warranty of goods.
- (559a) Pretence that a certain brickyard was good and profitable.
- (560) Pretence that goods were of a particular quality.
- (561) Pretence that a certain horse to be sold, etc., was sound, and was the horse called "Charley."
- (562) Pretence that a horse and phaeton were the property of a lady then shortly before deceased, and that the horse was kind, etc.
- (563) Second count. Like the first, except that the offering for sale was alleged to have been by T. K. the elder, only.
- (564) Other pretence as to the value and history of a horse, which the prisoners sold to the prosecutor.

- (565) Pretence that one J. P., of the city of Washington, wanted to buy some brandy, etc.; that said J. P. kept a large hotel at Washington, etc.; that defendant was sent by said J. P. to purchase brandy as aforesaid, and that defendant would pay cash therefor, if prosecutor would sell him the same. First count.
- (566) Second count. That defendant was requested by one J. P., who kept a large hotel in Washington city, to purchase some brandy for said J. P., and that if prosecutor would sell defendant two half pipes of brandy, defendant would pay prosecutor cash for the same shortly after delivery.
- (567) Third count. That defendant had been requested by one J. P. to purchase for him some brandy, that he (the said J. P.) kept a large hotel in Washington, etc.
- (567a) Pretence that defendant was a large dealer in potatoes, etc.
- (568) Pretence that one of the defendants, having advanced money to the other on a deposit of certain title deeds, had himself deposited the deeds with a friend, and that he received a sum of money to redeem them; with counts for conspiracy.
- (569) For pretending to an attesting justice and a recruiting sergeant that defendant was not an apprentice, and thereby obtaining money to enlist.
- (570) For obtaining more than the sum due for carriage of a parcel by producing a false ticket.
- (571) Pretence that defendant had no note protested for non-payment, that he was solvent, and worth from nine to ten thousand dollars.
- (572) Obtaining acceptances on drafts, by pretence that certain goods had been purchased by defendant and were about to be shipped to prosecutor.
- (573) Obtaining acceptances by the pretence that defendants had certain goods in storage subject to prosecutor's order.
- (574) Receiving goods obtained by false pretences, under the English statute.
- (574a) Another form.

(528) *General frame of indictment.(t)*

That A. B.,^(u) etc., on, etc., at, etc., unlawfully and knowingly devising and intending to cheat and defraud,^(v) etc. (*stating party intended to be defrauded*), of his goods, moneys, chattels, and pro-

(t) See Wh. Cr. L. 8th ed. § 1210.

(u) All the parties concerned in the offence may be joined as co-defendants. And evidence under a joint indictment that one of them, with the concurrence and approval of the other, made the false pretences charged, warrants the conviction of both. Wh. Cr. L. 8th ed. § 1171; *Com. v. Harley*, 7 Met. 462. Parties who have concurred and assisted in the fraud may be convicted as principals, though not present at the time of making the pretence and obtaining the money or goods. *R. v. Moland*, 6 C. & P. 657.

(v) This averment is not necessary when it may be implied from subsequent averments.

perty, did then and there unlawfully, knowingly, and designedly(*w*) falsely pretend(*x*) to C. D.,(*y*) that(*z*) (*setting out the pretence*), whereas, in truth and fact (*negating the pretence*),(*a*) as he, the said A. B., then and there well knew (*or, which said pretence the said A. B. then and there well knew to be false*),(*b*) by color(*c*) and means(*d*) of which said false pretence and pretences, he, the said A. B., did then and there unlawfully, knowingly, and designedly obtain(*e*) from the said C. D. (*stating the property obtained*),(*f*) being then and there the property of the said C. D.,(*g*) with intent to cheat and defraud the said C. D., to the great damage of the said C. D.,(*h*) contrary, etc. (*Conclude as in book 1, chapter 3.*)

(*w*) An indictment averring that the defendant did “falsely and feloniously pretend,” etc., is at common law bad. *R. v. Walker*, 6 C. & P. 657. In those states, however, as in New York, where the offence is a felony, the averment is of course essential. “Designedly” is usually necessary under statute. *State v. Baggerly*, 21 Tex. 757. “Knowingly” is essential in Texas. *Maranda v. State*, 44 Tex. 442. See generally *Wh. Cr. L.* 8th ed. § 1224.

(*x*) The word “pretend” is indispensable, though the word “falsely,” according to the English practice (*R. v. Airey*, 2 East, 30), is not essential, the truth of the pretences being subsequently negated. It is much safer, however, to insert it, and its omission has been held in this country fatal. *Hamilton v. State*, 16 Fla. 288.

(*y*) The party injured must be described with the same accuracy as has been shown to be requisite in larceny. *Wh. Cr. L.* 8th ed. § 977. Any variance in his name is at common law fatal. What are variances are elsewhere considered. *Wh. Cr. Ev.* § 91; *supra*, notes to form 2, p. 20.

Pretences alleged to have been made to a firm are proved by showing that they were made to one of the firm (*Stoughton v. State*, 2 Oh. St. 562); and a pretence made use of to an agent, who communicates it to his principal, and who is influenced by it to act, is a pretence made to the principal. *Wh. Cr. L.* 8th ed. § 1171; *Wh. Cr. Ev.* §§ 91, 102; *R. v. Lara*, 1 Leach C. C. 647; 6 T. R. 565; *Com. v. Call*, 21 Pick. 515; *Com. v. Harley*, 7 Met. 462. See also *R. v. Keeley*, 2 Den. C. C. 68; *R. v. Tully*, 9 C. & P. 227; *R. v. Dewey*, 11 Cox C. C. 115; *Com. v. Bagley*, 7 Pick. 279; *Com. v. Moor*, Thach. C. C. 410; *Stoughton v. State*, 2 Oh. St. 562; *Britt v. State*, 9 Humph. 31. A pretence made to A. in B.’s hearing, by which money is obtained from B., may be laid as a pretence made to B. *R. v. Dent*, 1 C. & K. 249. The money of a benefit society, whose rules were not enrolled, was kept in a box, of which E., one of the stewards, and two others, had keys; the defendant, on the false pretence that his wife was dead, which pretence he made to the clerk of the society in the hearing of E., obtained from the hands of E., out of the box, five pounds; it was held that in an indictment the pretence might be laid as made to E., and the money as the property of “E. and others,” obtained from E. *R. v. Dent*, 1 C. & K. 249. Money paid by or to an agent is rightfully laid as money paid by or to a principal. *Wh. Cr. Ev.* §§ 94–102. And so where money is paid to the wife for the husband. *R. v. Moseley*, Leigh & C. 92. See *R. v. Carter*, 7 C. & P. 134; *Sandy v. State*, 60 Ala. 58; *Wh. Cr. L.* 8th ed. § 1227.

(*z*) The pretences must be specially averred; *R. v. Mason*, 2 T. R. 581; *R. v. Henshaw*, L. & C. 444; *R. v. Goldsmith*, 12 Cox C. C. 479; *L. R.* 2 C. C. 74; *State v. Jackson*, 39 Conn. 229; though their omission is now in England

cured by verdict. But at common law they must be accurately and adequately set forth, so that it may clearly appear that there was a false pretence of an existing fact. *Ibid.*; *R. v. Henshaw*, L. & C. 444; 9 Cox C. C. 472; *Bonnell v. State*, 64 Ind. 498.

The pretences were held inadequately stated in an indictment in which the first count charged that C. unlawfully did falsely pretend to P. that he, C., was sent by W. for an order to go to T. for a pair of shoes, by means of which false pretence he did obtain from T. a pair of shoes, of the goods and chattels of T., with intent to defraud P. of the price of the said shoes, to wit, nine shillings, of the moneys of P. The second count charged that he falsely pretended to P. that W. had said that P. was to give him, the defendant, an order to go to T. for a pair of shoes, by means of which false pretence he did obtain from T., in the name of P., a pair of shoes of the goods of T., with intent to defraud T. of the same. *R. v. Tully*, 9 C. & P. 227—*Gurney*; though compare *R. v. Brown*, 2 Cox C. C. 348—per Patteson.

An indictment was also held defective in a case where it was charged that C. falsely pretended to P., whose mare and gelding had strayed, that he, C., would tell him where they were, if he would give him a sovereign down. P. gave the sovereign, but the prisoner *refused* to tell. It was said that the indictment should have stated that he pretended he knew where they were. *R. v. Douglas*, 1 M. C. C. 462.

In a case already cited on the merits, the indictment charged that C., contriving and intending to cheat P., on a day named, did falsely pretend to him that he, C., then was a captain in her majesty's fifth regiment of dragoons; by means of which false pretence he did obtain of P. a valuable security, to wit, an order for the payment of £500, of the value of £500, the property of P., with intent to cheat P. of the same; whereas in truth he (C., the defendant) was not, at the time of making such false pretence, a captain in her majesty's regiment; and the defendant, at the time of making such false pretence, well knew that he was not a captain, etc. This was held sufficient after conviction and judgment. It was held not necessary to allege more precisely that the defendant made the particular pretence with the intent of obtaining the security; nor how the particular pretence was calculated to effect, or had effected, the obtaining; and it was further held that the truth of the pretence was well negatived, it appearing sufficiently that the pretence was that the defendant was a captain at the time of his making such pretence, which was the fact denied; and it was unnecessary to aver expressly that the security was unsatisfied, at any rate since 7 Geo. IV., c. 64, s. 21, the objection being taken after verdict, and the indictment following the words of the statute creating the offence. *Hamilton v. R.* (in error) 9 A. & E. (N. S.) 271; 10 Jur. 1028; 16 L. J. M. C. 9; 2 Cox C. C. 11.

D. was one of many persons employed whose wages were paid weekly at a pay-table. On one occasion, when D.'s wages were due, C. said to a little boy, "I will give you a penny if you will go and get D.'s money." The boy innocently went to the pay-table, and said to the treasurer, "I am come for D.'s money;" and D.'s wages were given to him. He took the money to C., who was waiting outside, and who gave the boy the promised penny; it was ruled that C. could not be convicted on the charge of obtaining the money from the treasurer by falsely pretending to the treasurer that he, C., had authority from D. to receive his money, or of obtaining it from the treasurer and the boy, by falsely pretending to the boy that he had such authority, or of obtaining it from the boy by the like false pretences to the boy; though he might be convicted on a count charging him with fraudulently obtaining it from the treasurer by falsely pretending to the treasurer that the boy had this authority. *R. v. Butcher*, Bell C. C. 6; 8 Cox C. C. 77.

If the pretences explain themselves, and require no innuendoes (as to innuendoes, see notes to 577, 939, and Wh. Cr. L. 8th ed. §§ 1220, 1303), it is enough to state them in the terms in which they were expressed to the prosecutor at the time of the fraud. 2 East P. C. c. 18, s. 13, pp. 837, 838. See *Com. v. Hul-*

bert, 12 Met. 446; *Glackan v. Com.*, 3 Metc. (Ky.), 232; *State v. Webb*, 26 Iowa, 262. But verbal exactness is not required; as it is enough if the effect be substantially given; *R. v. Scott*, cited in *R. v. Parker*, 2 Mood. C. C. 1; 8 C. & P. 825; *State v. Call*, 48 N. H. 126; nor need all that was said be stated if the operative pretence is averred. *R. v. Hewgill*, Dears. C. C. 351; *Cowen v. People*, 14 Ill. 348. But a variance between the indictment and the evidence, as to the effect of the pretences, will be fatal; *R. v. Plestow*, 1 Camp. 494; *R. v. Bulmer, L. & C.* 476; 9 Cox C. C. 492; *State v. Locke*, 35 Ind. 419; though it is not necessary to set out, as in forgery, the tenor of a bad note by which property is obtained. Wh. Cr. L. 8th ed. § 1217. But if set out, a variance may be fatal. Wh. Cr. L. 8th ed. § 1233.

The relation of the fraud to the bargain, in cases of sale, must appear. *R. v. Reed*, 7 C. & P. 848; *R. v. Martin*, L. R. 1 C. C. 56; *State v. Phillbrick*, 31 Me. 401; *Com. v. Jeffries*, 7 Allen, 549; *Enders v. People*, 20 Mich. 233; *State v. Orvis*, 13 Ind. 569; *State v. Anderson*, 47 Iowa, 142. Thus it was held insufficient, in an indictment for the sale of a spurious watch as genuine, to aver merely that S., the defendant, falsely pretended to the prosecutor "that a certain watch which he, the said S., then and there had, was a gold watch, by means whereof said S. then and there unlawfully, etc., did obtain from said B. (the prosecutor) sundry bank bills, etc., of the value, etc., with intent the said B. then and there to cheat and defraud of the same; whereas in truth and fact said watch was not then and there a gold watch, and said S. then and there well knew that the same was not a gold watch, to the damage," etc. *Com. v. Strain*, 10 Met. 521; *S. P., Com. v. Lannan*, 1 Allen, 590. "The indictment," said Dewey, J., "does not allege any bargain nor any colloquies as to a bargain for a watch; nor any propositions of B. to buy, or of the defendant to sell, a watch; nor any delivery of the watch, as to which the false pretences were made, in the possession of B., as a consideration for the money paid the defendant. It seems to us that when money or property is obtained by a sale or exchange of property, effected by means of false pretences, such sale or exchange ought to be set forth in the indictment, and that the false pretence should be alleged to have been with a view to effect such sale or exchange, and that by reason thereof the party was induced to buy or exchange, as the case may be." *Com. v. Strain*, *supra*. See *Com. v. Nason*, 9 Gray, 125; *Com. v. Jeffries*, 7 Allen, 549. As to bad pleading of false agency, see *R. v. Henshaw*, L. & C. 444.

In fine, when the case is one of sale or exchange, the indictment should set forth the sale or exchange, and aver that the false pretences were made with a view to effect such sale or exchange, and that by reason thereof the party was induced to part with his property. *R. v. Reed*, 7 C. & P. 848; *State v. Phillbrick*, 31 Me. 401; *Enders v. People*, 20 Mich. 233. In New York the law is less stringent; *Skiff v. People*, 2 Parker C. R. 139; and where an indictment for obtaining property under false pretences charged that the prisoner, with an intent to defraud one A. G., Jr., did "falsely pretend and represent to the said A. G., Jr., for the purpose of inducing the said A. G., Jr., to part with a yoke of oxen, of the goods and chattels of the said A. G., Jr., that," etc., "by which said false pretences he," the prisoner, "then did unlawfully obtain from the said A. G., Jr.," the oxen mentioned; it was held that there was a substantial averment that the prisoner had obtained the property from the prosecutor by means of the false pretences made, and the latter's belief therein, and that the indictment was not defective in that particular. *Clark v. People*, 2 Lansing, 330. See to same effect, *State v. Vanderbilt*, 3 Dutch. 328. Wh. Cr. L. 8th ed. § 1227.

An indictment alleged that G. designedly and unlawfully did pretend to N. that A. wanted to buy cheese of N., and had sent G. to buy it for him, and that a certain paper described, purporting to be a ten dollar bill on the Globe Bank, in the city of New York, was a good bill, and of the value of ten dollars; by means of which false pretences said G. unlawfully obtained from said N. forty pounds of cheese, of the value of four dollars, and sundry bank bills and silver

coins amounting to and of the value of six dollars, with intent to cheat and defraud; whereas the said A. did not want to buy cheese of said N., and had not sent G. to him for that purpose, and the paper was not a good bill of the Globe Bank, in the city of New York, and was not of the value of ten dollars, but spurious and worthless. It was held, on motion in arrest of judgment, that the false pretences set forth were such as might have been effectual in accomplishing a fraud on N., in the manner alleged; that neither the omission to allege that G. knowingly made the false pretences, nor the omission to mention any person whom he intended to defraud, rendered the indictment bad; and that there was no objection to the indictment on the ground of duplicity. *Com. v. Hulbert*, 12 Met. 446.

In *Com. v. Coe*, 115 Mass. 481, elsewhere noticed, we have the following from Wells, J.: "The indictment alleges that the defendant falsely pretended that a certain certificate of shares of corporate stock was good and genuine and of value as security for a loan of money which Ferris was induced to make to him thereon. The pretended certificate is set forth, and purports to be a certificate that the said John Ferris is the owner of the shares of stock which it represents.

"1. One objection raised by the motion to quash is that the indictment does not show how Coe could pledge such stock, or use it to secure a loan from Ferris, or in any way defraud Ferris by means of it; Ferris being already the apparent owner. The transaction represented by the indictment, if genuine, would be simply that the borrower prepares his security by causing the shares of stock, whether owned by himself or procured from others for the purpose is immaterial, to be transferred to the name of the proposed lender, and a certificate issued accordingly. Upon procuring the loan, the delivery of the certificate completes the security. The certificate, although previously made in the name of the lender, does not become his in fact until the loan has been perfected and the certificate delivered to him in pursuance of its purpose. If the certificate is forged, or false and fraudulent in its preparation, it is manifest that he is defrauded when induced to take it as genuine and advance money in reliance upon it. The offer of the certificate for such a purpose is a representation that it is what it purports to be upon its face. *Cabot Bank v. Morton*, 4 Gray, 156; *Com. v. Stone*, 4 Met. 43. The indictment sufficiently sets forth in what manner Ferris was defrauded by means of the certificate.

"2. The certificate is an instrument complete in itself, and requires no further allegations to fully set forth the right or contract of which it is a symbol, as was necessary in *Com. v. Ray*, 3 Gray, 441, and *Com. v. Hinds*, 101 Mass. 209. And besides, this offence consists in the use of false tokens, and not the forgery of a written instrument.

"3. It is unnecessary that the indictment should set forth in its terms, or by description, the check received for the loan. It is presumed to have been given and received as payment of the sum of money agreed to be lent. Its designation as a 'check and order for the payment of money' sufficiently indicates its character; and as a description of the property obtained by the false pretences would be good. *Com. v. Brettun*, 100 Mass. 206. But there is also in the indictment an allegation that the defendant did obtain the sum of seven thousand dollars, of the property of said Ferris.

"4. It is indeed alleged that the defendant procured, and Ferris was induced to part with, the money as a loan only. But it is also alleged that he thereby did obtain it with intent to cheat and defraud. If so obtained, it is none the less a fraud because obtained in the form of a loan. *Com. v. Lincoln*, 11 Allen, 233.

"5. Such representations relate only to the validity and value of the security, and not to the means or ability of the party to pay; and are therefore not within the exception requiring a writing. *Gen. Sts. c. 161, § 54*.

"6. The allegation that the certificate 'was of the tenor following,' must be referred to the time when the false representation was made, of which it constitutes the main part. The copy correctly sets forth its tenor.

"As to the objections taken at the trial :—

"1. The indorsements upon the certificate form no part of it. They are not required to be set out, either as a part of the means of deceit, or as a description of the false token used. Their appearance upon the certificate when produced does not therefore occasion a variance.

"2. It is only necessary that the indictment set out the false representations upon which the property was obtained. That a genuine note was given is a matter of evidence, bearing upon the question whether the money was in fact obtained by means of the false certificate. The note forms no part of the offence charged, either by way of description or otherwise ; and no allegation in regard to it is necessary. The offence is the same, with or without the presence of that fact. No variance comes from its appearance in the evidence.

"3. The allegation of the indictment that the certificate was not a good, valid, and genuine writing and certificate of ownership of stock, but was false, forged, and counterfeit, and of no value, is sustained by the evidence. Even if it might have been of some value as a means of securing to the holder the one share for which it was originally issued as a genuine and valid certificate, proof of such value does not constitute a variance. It is not a descriptive allegation.

"4. Evidence of the possession and use of other altered and false certificates by the defendant, about the same time, whether before or afterwards, was competent to show that his possession of those, for the use of which he was indicted, was not casual and accidental. They were all between the dates of the transactions charged in the two counts. They were admitted and allowed to be used only to show guilty knowledge. For this purpose the evidence was admissible ; and the instructions sufficiently guarded its use. *Com. v. Stone*, 4 Met. 43, 47 ; *Com. v. Price*, 10 Gray, 472 ; *Com. v. Edgerly*, 10 Allen, 184.

"5. The fact that the certificate was offered and received as security for the loan furnishes some evidence upon which it was competent for the jury to find that Ferris was thereby induced to part with his money. It is not necessary that there should have been any explicit declaration or express words to that effect, at the time of the negotiation. It was for the jury to determine how far the testimony of Ferris, that he 'had every confidence in' the defendant, in reply to the question if he did not rather trust Coe than any security, was a denial of reliance upon the security.

"6. The instruction upon this last point would be objectionable if it bore the significance which the defendant ascribes to it. The presiding judge suggested the query, whether, if Ferris had known it to be a forged and worthless piece of paper, he would have made the loan as he did ; and then proceeded to say, 'If he would not, and was in fact induced to make the loan by the delivery of the certificate, and his belief in its genuineness and value,' and the jury find the other facts constituting the offence, it would be sufficient ; adding also, 'And the fact, if it was a fact, that the defendant then entertained the purpose of repaying the loan at some future time, would not divest the act of its criminality.'"

An indictment alleging that the prisoners falsely pretended to A. that some soot which they then delivered to A. weighed one ton and seventeen cwt., whereas it did not weigh one ton seventeen cwt., but only weighed one ton and thirteen cwt., they well knowing the pretence to be false, by means of which false pretence they obtained from A. 8s., with intent to defraud, is good, and sufficiently describes an indictable false pretence. *R. v. Lee*, L. & C. 418 ; 9 Cox C. C. 460. See *Wh. Cr. L.* 8th ed. § 1159.

The amount of property stated by the defendant to belong to him must be proved as laid. Thus where the averment was that the defendant represented a firm, of which he was a member, to be then owing not more than three hundred dollars, and evidence was given of a representation by him that the firm did not then owe more than four hundred dollars ; this was held to be a fatal variance. *Com. v. Davidson*, 1 Cush. 33. See *Todd v. State*, 31 Ind. 514.

A pretence that the prisoner "had in Macon seven thousand dollars" is not

sustained by proof of a pretence "that he had seven dollars less than seven thousand in a bank in Macon." *Langtry v. State*, 30 Ala. 537.

In an indictment setting forth that a bad and spurious note or coin had been passed by the prisoners on the prosecutor, it is not necessary to set forth the note at large or specifically to describe the coin. *Wh. Cr. L.* 8th ed. §§ 1129, 1162, 1222; *R. v. Coulson*, 1 Den. C. C. 592; 4 Cox C. C. 227; *T. & M.* 332; *State v. Boon*, 4 Jones (N. C.) 463; *State v. Dyer*, 41 Tex. 520. "When the setting out the instrument in the indictment," said Wilde, C. J., "cannot afford the court information, it is unnecessary that it should be set out. Here it is alleged that a certain piece of paper was unlawfully and falsely represented by the prisoner to be a good and valid promissory note, whereas it was not so. It appears to me that all the cases show that where the instrument has been required to be set out in the indictment, something has turned on the construction of the paper." *R. v. Coulson*, *ut supra*. Where it is charged in the indictment that the prisoner obtained the property upon the security of his promissory note, through false and fraudulent representations as to his ability to pay the same, an averment of his neglect to make payment of the note is not essential. *Clark v. People*, 2 Lansing, 330. But the purport or generic designation must be accurately stated. *Com. v. Stone*, 4 Met. 43; *Com. v. Coe*, *ut supra*. An indictment stated that, by the rules of a benefit society, every free member was entitled to five pounds on the death of his wife, and that the defendant falsely pretended that a paper which he produced was genuine, and contained a true account of his wife's death and burial, and that he *further* falsely pretended that he was entitled to five pounds from the society by virtue of their rule, in consequence of the death of his wife; by means of which 'last false pretence' he obtained money; this was held good. *R. v. Dent*, 1 C. & K. 249; *infra*, 535. Thus if an indictment for attempting to obtain money under false pretences charges the attempt to have been by means of a paper writing purporting to be an order for money, and the instrument cannot be considered as stated in the indictment to be such an order, it is bad. *R. v. Cartwright*, *R. & R.* 106. See fully *Wh. Cr. Pl. & Pr.* §§ 184 *et seq.*

When the false pretences consist in words used by the respondent, it has been said to be sufficient to set them out in the indictment as they were uttered, without undertaking to explain their meaning. *State v. Call*, 48 N. H. 126. See *Skiff v. People*, 2 Parker C. R. 139. But this must be taken with some qualification, since, as in perjury and libel, it is proper that language otherwise unintelligible should be explained. See notes to 577, 939.

It is not necessary to prove the whole of the pretences charged; proof of part, and that the property was obtained by force of such part, is enough. *R. v. Hill*, *R. & R.* 190; *R. v. Ady*, 7 C. & P. 140; *R. v. Hewgill*, *Dears.* 315; 24 Eng. L. & Eq. 556; *R. v. English*, 12 Cox C. C. 171; *State v. Mills*, 17 Me. 211; *State v. Dunlap*, 24 Me. 77; *Com. v. Morrill*, 8 Cush. 571; *People v. Stone*, 9 Wend. 182; *People v. Haynes*, 11 Wend. 565; *Skiff v. People*, 2 Parker C. R. 139; *Com. v. Daniel*, 2 Pars. 333; *Britt v. State*, 9 Humph. 31; *Cowen v. People*, 14 Ill. 348; *State v. Vorbeck*, 66 Mo. 168; *Wh. Cr. Ev.* § 131. And the principle derives support from the practice in the analogous cases of perjury and blasphemy. *Lord Raym.* 886; 2 Camp. 138-9; *Cro. C. C.* 7th ed. 662; *State v. Hascall*, 6 N. H. 352; *Com. v. Kneeland*, 20 Pick. 206; *Wh. Cr. L.* 8th ed. § 1316.

If the effect of the pretences be rightfully laid, a variance as to expression is immaterial. *State v. Vanderbilt*, 3 Dutch. 328, and cases cited *supra*.

(a) It is necessary for the pleader to negative specifically the false pretences relied on to sustain the indictment. *R. v. Perrott*, 2 M. & S. 379; *Tyler v. State*, 2 Humph. 37; *Amos v. State*, 10 Humph. 117; *State v. Webb*, 26 Iowa, 262. The negation must be specific. *Keller v. State*, 51 Ind. 111; *State v. Bradley*, 68 Mo. 140. But if the proof be adequate as to the offence, though only coming up to a portion of the pretence averred in the indictment, a conviction is good. *Wh. Cr. L.* 8th ed. §§ 1218, 1224; *R. v. Hill*, *R. & R.* 190; *Com. v.*

Morrill, 8 Cush. 571; *People v. Stone*, 9 Wend. 182; *People v. Haynes*, 11 Wend. 565; *State v. Smith*, 8 Blackf. 489. In fact, as is well said by Lord Ellenborough, "to state merely the whole of the false pretence is to state a matter generally combined of some truth as well as falsehood." *R. v. Perrott, ut supra*. Where, however, there are several distinct pretences, it is better to negative each pretence specifically in the indictment; since, if only one of the pretences thus negatived is well laid, and is proved on trial to have been the moving cause of the transfer of property from the prosecutor to the defendant, the rest may be disregarded. See *Wh. Cr. Ev.* §§ 131-3; *Wh. Cr. L.* 8th ed. § 1218.

(b) The defendant's knowledge of the falsity of the pretences is material. *Wh. Cr. L.* 8th ed. §§ 1185, 1210. *State v. Blauvelt*, 38 N. J. L. 306. Thus an indictment for obtaining money under false pretences must allege that the defendant knew the falsehood: "falsely and fraudulently" is not enough. *R. v. Henderson*, 2 M. C. C. 192; *Car. & M.* 328. But where the indictment alleged that the defendant "did unlawfully falsely pretend," etc., it was held that the omission of the word "knowingly" was no ground for arresting the judgment. *R. v. Bowen*, 4 New Sess. Cas. 62; 13 Q. B. 790; 3 Cox C. C. 483. It is more prudent to aver *scienter*, unless the pretences stated are of such a nature as to exclude the possible hypothesis of the defendant's ignorance of their falsity. *R. v. Philpotts*, 1 C. & K. 112; *R. v. Keighley, Dears. & B.* 145; 7 Cox C. C. 217; *Com. v. Speer*, 2 Virg. Cases, 65; *State v. Bradley*, 68 Mo. 140; though see *Com. v. Hulbert*, 12 Met. 446. See, as to general pleading of *scienter*, *Wh. Cr. Pl. & Pr.* § 164.

An intent to defraud must be averred and proved. *Wh. Cr. L.* 8th ed. § 1184; *People v. Getchell*, 6 Mich. 496; *Scott v. People*, 62 Barb. 62. The intent to defraud is not sufficiently set forth in a statement that A. did unlawfully attempt and endeavor fraudulently, falsely, and unlawfully to obtain from the Agricultural Cattle Insurance Company a large sum of money, to wit, £22 10s., with intent to cheat and defraud the company. *R. v. Marsh*, 1 Den. C. C. 505; *T. & M.* 192; 3 New Sess. Cas. 699. That the omission of the allegation of intent is not fatal after verdict, under statute, see *State v. Bacon*, 7 Vt. 219; *Jim. v. State*, 8 Humph. 603. That it is no variance that the proof goes only to a part of the money, to which the intent to defraud relates, see *R. v. Leonard*, 3 Cox C. C. 284; 1 Den. C. C. 304. By 14 & 15 Vict. c. 100, s. 8, it shall be sufficient, in an indictment for obtaining property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to defraud any particular person. By sec. 25, every objection to an indictment for any formal defect apparent on the face thereof shall be taken before the jury shall be sworn. It was ruled that sec. 8 did not render it unnecessary, in an indictment for obtaining money by false pretences, to state whose property the money was, and that the omission was not a formal defect within sec. 25. *Sill v. R.*, *Dears. C. C.* 132; 1 El. & Bl. 553. 24 & 25 Vict. c. 96, s. 88, renders an allegation of ownership unnecessary. It is not necessary, however, in England, to state, to use the language of Lord Denman, *C. J.* (*R. v. Hamilton*, 2 Cox. C. C. 11; 9 Ad. & El. N. S. 276), "that the false pretence was made with the intention of obtaining the thing, if it be proved that in fact the party charged did intend to obtain the thing, made the false pretence, and did thereby obtain it. I am by no means sure that it is necessary even to prove that the representation was made with the particular intent."

An intent to defraud a firm necessarily includes an intent to defraud each of its members, and hence it is enough, when a firm is defrauded, to aver an intent to defraud a member of the firm. *Stoughton v. State*, 2 Ohio St. 562. See *Wh. Cr. L.* 8th ed. §§ 743, 1212.

An averment that A. "did receive and obtain the said goods of said B. from said B. by means of the false pretences aforesaid, and with intent to cheat and defraud the said B. of the same goods," is a sufficient averment that the goods were designedly obtained. *Com. v. Hooper*, 104 Mass. 549. But there must be

a specific averment of intent to defraud the prosecutor. *Com. v. Dean*, 110 Mass. 64.

In this case it was said by Morton, J.: "The indictment does not charge any offence with the precision requisite in criminal pleadings. There is no sufficient allegation that the defendant obtained the signature of Sears to the note with an intent to defraud. The intent to defraud is an essential element of the crime intended to be charged, and must be distinctly averred by a proper affirmative allegation, and not by way of inference or argument merely. *Com. v. Lannan*, 1 Allen, 590.

"The concluding clause, that 'so the jurors aforesaid, upon their oaths aforesaid, do say and present, that said Dean,' in the manner aforesaid, designedly, by a false pretence and with intent to defraud, obtained the signature of said Sears,' is a statement of a legal conclusion from the facts previously charged. The conclusion does not follow from the premises. The only allegation of an intent to defraud is made argumentatively, and as a legal inference from facts stated, and that inference is unsound. *Com. v. Whitney*, 5 Gray, 85; *R. v. Rushworth*, R. & R. 317."

(c) "Color" alone is inadequate. *State v. Chunn*, 19 Mo. 233.

(d) The property must be distinctly averred to have been obtained by means of the pretence. But the process of reasoning by which the conclusion was reached is usually matter of argument, not of pleading. *R. v. Hamilton*, 9 Ad. & El. (N. S.) 271; *Com. v. Hulbert*, 12 Met. 446; *Com. v. Coe*, 115 Mass. 481; *State v. Hurst*, 13 W. Va. 54. See Wh. Cr. L. 8th ed. § 1215. At the same time, there must always be something sufficient to show that the party defrauded was induced to part with his property by relying upon the truth of the alleged false statements. *State v. Philbrick*, 31 Me. 401; *Com. v. Strain*, 10 Met. 521; *Norris v. State*, 25 Oh. St. 219; *State v. Saunders*, 63 Mo. 482. See *Com. v. Parmenter*, 121 Mass. 354; *Epperson v. State*, 42 Tex. 79; *State v. Green*, 7 Wis. 676; *State v. Orvis*, 13 Ind. 569. And it is not, as a general rule (Wh. Cr. L. 8th ed. §§ 1215, 1216), enough to aver false statements as to the value of property sold, and then to aver the obtaining of money. A sale of the property should be averred, as the chain connecting the other averments. Wh. Cr. L. 8th ed. § 1215; see *supra*, note 2, p. 507.

In an indictment against A., for obtaining goods from B. by false pretences, an averment that B. "was induced, by reason of the false pretences so made as aforesaid, to purchase and receive, and did then and there purchase and receive of the said A." certain property, "and to pay and deliver, and did pay and deliver therefor, and as the price thereof," certain goods, sufficiently charges that B. was induced by the false pretences to pay and deliver, and that induced by false pretences he did pay and deliver, and is not defective for not repeating the words "then and there" before the words "to pay and deliver," or before the words "did pay and deliver." *Com. v. Hooper*, 104 Mass. 549.

The allegation of "a sale on credit," is supported by proof of a sale for a note payable in four months. *Com. v. Davidson*, 1 Cush. 33; Wh. Cr. L. 8th ed. § 1180.

The indictment need not charge that any false token or counterfeit letter was used, even where false token or writing is alternatively used in the statute. *Skiff v. People*, 2 Parker C. R. 139.

A delivery of the property must be averred, as the result of the false pretences, in all cases in which the prosecution rests upon such delivery. *State v. Philbrick*, 31 Me. 401; *Com. v. Strain*, 10 Met. 521; *Com. v. Lannan*, 1 Allen, 590; *Com. v. Goddard*, 4 Allen, 312. See also *Com. v. Jeffries*, 7 Allen, 549; *Com. v. Lincoln*, 11 Allen, 233.

It is not a fatal error that the obtaining of the signature to a promissory note, and the obtaining the money on the same, are stated to be on two distinct days. *Com. v. Frey*, 50 Penn. St. 245.

(e) The "obtaining" must be alleged in name. *State v. Bacon*, 7 Vt. 219. Obtaining from an agent is obtaining from a principal. Wh. Cr. L. 8th ed. § 1128. "Knowingly," and "designedly," if averred previously, are here surplusage.

(529) *Form used in Massachusetts.*

That A. B., etc., on, etc., at, etc., being a person of an evil disposition, and devising and intending by unlawful ways and means to obtain and get into his hands and possession the goods, merchandise, chattels, and effects of the honest and good citizens of this commonwealth, and with intent to cheat and defraud C. D., etc., did then and there unlawfully, knowingly, and designedly, falsely pretend and represent to said C. D. (*stating pretences*); and the said C. D. then and there, believing the said false pretences and representations, so made as aforesaid by the said A. B., and being deceived thereby, was induced, by reason of the false pretences and representations so made as aforesaid, to deliver, and did then and there deliver, to the said A. B. (*stating goods*), of the proper goods, merchandise, chattels, and effects of said C. D., and the said A. B. did then and there receive and obtain the said goods, merchandise, chattels, and effects of the said C. D., by means of the false pretences and representations aforesaid, and with intent to cheat and defraud the said C. D. of the same goods and merchandise, chattels, and effects; whereas, in truth and in fact (*negativating the pretences*);

(*f*) It is generally necessary that the property obtained should be described with the same accuracy as in larceny. *Com. v. Morrell*, 8 Cush. 571; *Dord v. People*, 9 Barb. 671; *State v. Kube*, 20 Wis. 217; *Wh. Cr. L.* 8th ed. § 1221. Where a signature to a note has been obtained by false pretences, and the party defrauded has been obliged to pay the note, it is enough to charge the sum paid to have been obtained, etc., without setting forth the obtaining of the signature. *People v. Herrick*, 13 Wend. 87. A signature to negotiable paper must be described as such. *State v. Blauvelt*, 38 N. J. L. 396. And it is enough to say "— dollars of the money and property of A. B.," without stating whether this money was in bank notes, specie, etc. *Com. v. Lincoln*, 11 Allen, 233.

All the property obtained need not be set forth. *Wh. Cr. L.* 8th ed. § 1221.

At common law the description of the property must be as in larceny. (See notes to 415.) Value, however, need not be alleged. *People v. Stetson*, 4 Barb. 151; *State v. Gillespie*, 80 N. C. 396; see *Com. v. Lincoln*, 11 Allen, 233; *Wh. Cr. Pl. & Pr.* § 215. It is otherwise when punishment depends upon value. *Ibid.*; *State v. Ladd*, 32 N. H. 110.

(*g*) The indictment must state the goods to be the property of some person named, and where no owner is laid, the indictment will be quashed. *R. v. Parker*, 3 A. & E. 292; *R. v. Norton*, 8 C. & P. 196; *R. v. Martin*, 8 A. & E. 481; 3 N. & P. 472; *Sill v. R.*, *Dears. C. C.* 132, 16 Eng. L. & Eq. 375; *State v. Lathrop*, 15 Vt. 279; *Wh. Cr. L.* 8th ed. § 1223.

Distinct counts may lay distinct ownerships. *Oliver v. State*, 37 Ala. 134.

(*h*) It is not necessary, as it has been laid down in New York and Massachusetts, to aver damage to the prosecutor. *People v. Genung*, 11 Wend. 18; *Com. v. Wilgus*, 4 Pick. 177.

Counts varying the pretences may be joined. *Wh. Cr. Pl. & Pr.* § 285; *supra*, note to form 2, p. 31.

and so the jurors aforesaid, upon their oaths aforesaid, do say, that the said A. B., by means of the false pretences aforesaid, on, etc., at, etc., unlawfully, knowingly, and designedly did receive and obtain from said C. D. the said goods, merchandise, chattels, and effects, of the proper goods, merchandise, chattels, and effects of the said C. D., with intent to defraud C. D. of the same, against, etc. (*Conclude as in book 1, chapter 3.*)

(530) *Same in New York.*

That A. B., etc., on, etc., at, etc., being a person of an evil disposition, ill-name and fame, and of dishonest conversation, and devising and intending, by unlawful ways and means, to obtain and get into his hands and possession the moneys, valuable things, goods, chattels, personal property, and effects of the honest and good people of the state of New York, to maintain his idle and profligate course of life, on, etc., at, etc., with intent feloniously to cheat and defraud one C. D., did then and there feloniously, unlawfully, knowingly, and designedly, falsely pretend and represent to the said C. D., that (*stating the pretences*); and the said C. D. then and there, believing the said false pretences and representations, so made as aforesaid by the said A. B., and being deceived thereby, was induced, by reason of the false pretences and representations so made as aforesaid, to deliver, and did then and there deliver, to the said A. B. (*stating goods*), of the proper moneys, valuable things, goods, chattels, personal property, and effects of the said C. D., and the said A. B. did then and there designedly receive and obtain the said, etc., of the said C. D., of the proper moneys, valuable things, goods, chattels, personal property, and effects of the said C. D., by means of the false pretences and representations aforesaid, and with intent feloniously to cheat and defraud the said C. D. of the said, etc.; whereas, in truth and in fact, the said (*negating pretences*); and whereas, in fact and in truth, the pretences and representations, etc, so made as aforesaid, by the said A. B. to the said C. D., was and were in all respects utterly false and untrue, to wit, on the day and year last aforesaid, at the ward, city, and county aforesaid; and whereas, in fact and in truth, the said A. B. well knew the said pretences and representations, so by him made as aforesaid to the said C. D., to be utterly false and untrue at the time of making the same.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B., by means of the false pretences aforesaid, on the day and year last aforesaid, at the ward, city, and county aforesaid, feloniously, unlawfully, falsely, knowingly, and designedly did receive and obtain from the said C. D., of the proper moneys, valuable things, goods, chattels, personal property, and effects of the said C. D., with intent feloniously to cheat and defraud C. D. of the same, against, etc. (*Conclude as in book 1, chapter 3.*)

(531) *Pretence that defendant was agent of a lottery, etc.*(i)

That A. W. W., etc., on, etc., at, etc., being a wicked and evil disposed person, and a common cheat, and contriving and intending fraudulently and deceitfully to cheat and defraud one E. H. of his moneys and property, on, etc., falsely and fraudulently did knowingly and designedly pretend to the said E. H. that his name was H. C., that he was an agent for the managers of a certain lottery, called The Maryland Grand State Lottery, and that he had a number of quarters of tickets in said lottery, and then and there exhibited a great number of quarters of tickets in said lottery, signed H. C., with the numbers of the original tickets in said lottery written therein, and then and there falsely and fraudulently did knowingly and designedly pretend that the said quarters of tickets were true and genuine, and that he had the original tickets corresponding with the numbers of the said quarters of tickets then deposited in a bank in Boston, whereas, in truth and in fact, his true name was A. W. W., and not H. C., as he falsely pretended, and in truth and in fact he was not, and never was an agent for the managers of the lottery called The Maryland Grand State Lottery, and the said quarters of tickets so exhibited by the said A. W. W. were not genuine parts of original tickets in said lottery, but were spurious and fabricated for the sole purpose to deceive, defraud, and injure, and he had not and never had in his possession, nor deposited in any bank, the original and genuine tickets corresponding to the numbers of said quarters of tickets so exhibited to the said E. H. And the jurors aforesaid, upon their oath

(i) See *Com. v. Wilgus*, 4 Pick. 177, where this count was held good. Wh. Cr. L. 8th ed. §§ 1162, 1186.

aforesaid, do further present, that the said A. W. W., on the day and year last aforesaid, at said Cambridge, in the county aforesaid, by the false tokens and pretences aforesaid, falsely and fraudulently did knowingly and designedly obtain and get into his possession from the said E. H. fifteen dollars, of the moneys and property of the said E. H., with the intent him the said E. H. then and there to cheat and defraud of the same, to the great damage of the said E. H., in evil example to others in like case to offend, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(532) *Obtaining money by personating another.*

The jurors, etc., upon their oath present, that A. B., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord at B. aforesaid, in the county aforesaid, unlawfully, knowingly, and designedly did falsely pretend to E., the wife of C. D., that the said A. B. was F. G., and that he was the same person that had cured H. I.; by means of which said false pretences the said A. B. did then and there unlawfully, knowingly, and designedly obtain from the said E. the sum of five dollars, of the money of the said C. D., with intent then and there to cheat and defraud the said C. D. of the same; whereas, in truth and in fact, the said A. B. was not F. G.; and whereas, in truth and in fact, the said A. B. was not the same person that had cured H. I., as the said A. B. then and there well knew, contrary to the form of the statute in such case made and provided, etc.

(533) *Pretence that defendant was M. H., who had cured Mrs. C. at the Oxford Infirmary, whereby he induced the prosecutor to buy a bottle of ointment, etc., for which he received a sovereign, giving 15s. in change.(j)*

That A. B., etc., on, etc., at, etc., did unlawfully and falsely, knowingly and designedly pretend to one C., the wife of G. P., that he, the said A. B., was M. H., and that he was the same person that had cured Mrs. C. at the Oxford Infirmary; by means

(j) *R. v. Bloomfield*, 1 C. & M. 537. The defendant was convicted before Cresswell, J., at the sessions, and sentence passed. See Wh. Cr. L. 8th ed. §§ 1143, 1184, 1200.

of which said false pretence, he the said A. B. did then and there obtain from the said G. P., the husband of the said C. P., one piece of the current gold coin of this realm, called a sovereign, of the moneys, goods, and chattels of the said G. P., with intent then and there to cheat and defraud him, the said G. P., of the sum of five shillings, parcel of the value of the said last mentioned piece of the current gold coin, whereas, in truth and in fact, etc. (*negativing the false pretences, and proceeding as in general frame*).

(534) *Against a member of a benefit club or society, for obtaining money belonging to the rest of the members, under false pretences.*(k)

That on, etc., at, etc., certain persons united together and formed themselves into a certain lawful and beneficial club or society, called, etc. (*as the name may be*), under certain printed articles, rules, orders, or regulations, made for the good order and government of the said club or society (which said articles, rules, etc., were afterwards, to wit, at the general quarter sessions of the peace, holden at in the county of aforesaid, duly exhibited, confirmed, and filed, according to the statute in such case made and provided), and then and there, and on divers other days and times, between that day and the third of May, in the twenty-ninth year, etc., contributed and paid divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of one hundred pounds and upwards, of lawful money, into the said club or society, and deposited the same in a certain box, left in the dwelling-house of one T. R., at K. aforesaid, commonly called or known by the name or sign of, etc. (*as it may be*), and there kept for the use, benefit, and advantage of the members of the said club or society at the time being. And the jurors, etc., do further present, that in and by a certain article of the said rules and orders of the said club or society, it is declared, ordered, and agreed that, etc. (*here recite the article relating to the payment of money towards the funerals of the members' wives*). And the jurors, etc., that on the same day and year last aforesaid, at, etc., aforesaid, one L. P., late of, etc., one A. B., and

one C. D., etc. (*here insert the rest of the members' names which appear by the club book to be existing at this time*), were members of the said club or society, contributing and paying money into and for the use of the said club or society, that is to say, for the general benefit and advantage of all members thereof, at the said house of the said T. R., for the purpose, amongst other things, mentioned, declared, and contained in the said article above mentioned and set forth. And the jurors, etc., do further present, that on, etc., last aforesaid, at, etc., aforesaid, a large sum of money, to wit, the sum of one hundred pounds (*this need not be the exact sum, let it be something under the sum contained in the box at this time*), of like lawful money, was and remained in the said box, kept for the purpose in that behalf aforesaid, in the said house of the said T. R., there before then deposited therein, by and for and on behalf of all the members of the said club or society. And the jurors, etc., do further present, that by the assent and concurrence of all the members of the said club or society, it had been usual and customary during all the time aforesaid (except the nights on which the said club or society had been there holden) for the members of the society, having a right or occasion to withdraw, or receive any money to which they had been entitled by the articles, rules, and orders of the said club or society, from and out of the said box, to apply to the said T. R. for the payment of the same, upon condition that he the said T. R. should be repaid the same from and out of such money contained in the said box, for the purpose in that behalf aforesaid, on some subsequent night on which the said club or society should be holden at the said house of him the said T. R., at K. aforesaid. And the jurors, etc., that the said L. P., so being such member as aforesaid, and well knowing all and singular the premises aforesaid, on, etc., at, etc., aforesaid, unlawfully, knowingly, and designedly did falsely pretend to the said T. R. that the wife of him the said L. P. was then dead, and that he the said L. P. then wanted thirty shillings to bury his said wife, by means of which said false pretences he the said L. P. then and there unlawfully, knowingly, and designedly did obtain of and from the said T. R. the said sum of thirty shillings, with intent then and there to cheat and defraud the said A. B., C. D., etc. (*the other members of the club*), of the same,

whereas, in truth and in fact, the wife of him the said L. P. was not dead at the said time he so made the false pretences to the said T. R. as aforesaid; and whereas, in truth and in fact, he the said L. P., at the time of the false pretences, did not want the said sum of thirty shillings, or any sum of money whatsoever, for the purpose of burying his wife, or of any person whatsoever having been the wife of him the said L. P., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(535) *Another form for same, coupled with the production to the society of a false certificate of burial. First count. (In substance.)(l)*

That R. D., etc., on, etc., at, etc., unlawfully did falsely pretend to F. E. that the wife of him the said R. D. was then dead. By means of which he obtained from the said F. E. silver coin to the amount of three pounds fifteen shillings, of the moneys of the said F. E., with intent to defraud F. E., whereas, in truth and in fact, the said wife of the said R. D. was not then dead, as he the said R. D. then well knew, etc.

(*The second count was similar, only adding all through it the words "and others" after the name of F. E.*)

Third count. (In full.)

That before and at the time of the committing of the offence in this count mentioned, to wit, etc., there was a certain friendly society, commonly called "The George and Dragon Friendly Society," and that the said R. D. was then and there a free member of the said society, and that by the rules of the said society it was amongst other things provided, that when any free member's wife dies, such member shall be allowed five pounds out of the society's stock, to wit, at, etc.

(l) R. v. Dent, 1 C. & K. 249. After a conviction on this indictment, a motion for arrest of judgment was refused. It appeared that the money of a benefit society, whose rules were not enrolled, was kept in a box, of which E., one of the stewards, and two others had keys. The defendant, on the false pretence that his wife was dead, which pretence he made to the clerk of the society in the hearing of E., obtained from the hands of E., out of the box, £5. It was held, that in an indictment the pretence might be laid as made to E., and the money, the property of "E. and others," obtained from E. The first count describes the wife of the defendant, and the third count mentions "the said wife" of the defendant. It was ruled, that the third count sufficiently referred to the person mentioned as his wife in the first count. See Wh. Cr. L. 8th ed. §§ 1212, 1220.

That before and at the time of the committing the offence in this count mentioned, to wit, etc., the said F. E. was one of the stewards of the said society.

That the said R. D., being such member of the said society as aforesaid, etc., on, etc., at, etc., did produce to the said F. E., so being such steward as aforesaid, a certain paper writing directed to one G. H. S. G., near Bristol, paid; and which said paper writing then was in the words and figures following, that is to say:—

“London, November the 8th, 1843.

“Sir: I received your letter this morning, and was sorry to state that we did not send the particulars to you in the last letter we sent. She (meaning the said wife of the said R. D.) died October 18th, and was buried on Monday, 23d, at the Baptist (meaning Baptist) Chappell, in New Pye Street, Westminster, London. I hope this will find you in perfect health, as it leaves us all at present. So I conclude, with kind love to you and all her inquiring friends. Please to deliver this to Mr. R. D.

“This is to certify that I, T. H. N., attended (meaning attended) the funeral of M. D., on the 23d day of October, being the minister of the Baptist Chappell, in New Pie Street, Westminster, London.”

That the said R. D., so being such free member of the society as aforesaid, then and there unlawfully, knowingly, and designedly did falsely pretend to the said F. E., so being such steward of the said society as aforesaid, that the said paper writing was a true, correct, and genuine paper writing, and that the same contained a true, correct, and genuine account of the death of the said wife of the said R. D., and of her burial at the Baptist Chapel, in New Pye Street, Westminster, London; and that the said R. D., so being such free member as aforesaid, did then and there further unlawfully, knowingly, and designedly falsely pretend to the said F. E., so being such steward of the said society as aforesaid, that the said wife of the said R. D. was then dead, and that he the said R. D., as such free member as aforesaid, was then and there entitled to receive from the stewards of the said society the sum of five pounds, under and by virtue of the rules of said society, in consequence of the death of his said wife. By means of which said last mentioned false pretence the said

R. D. did then and there unlawfully obtain from the said F. E. two pieces of the current silver coin of this realm, called crowns (*describing silver and copper coins to the amount of three pounds fifteen shillings*), of the moneys of the said F. E. and others, with intent then and there to cheat and defraud the said F. E. and others of the same; whereas, in truth and in fact, the said paper writing was not a true, correct, or genuine paper writing; and whereas, in truth and in fact, the said paper did not contain a true, correct, or genuine account of the death of the said wife of the said R. D., or of her burial at the Baptist Chapel, New Pye Street, Westminster, London; and whereas, in truth and in fact, the said wife of the said R. D. was not then dead; and whereas, in truth and in fact, the said R. D. as such free member as aforesaid, was not then entitled to receive from the stewards of the said society the sum of five pounds, or any other sum whatever, under and by virtue of the said rules of the said society, in consequence of the death of his said wife.

That the said R. D. well knew, at the time when he did so falsely pretend as last aforesaid, that each and every of the said pretences were false, to wit, at the parish aforesaid, in the county aforesaid, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(536) *Pretence that a broken bank note was good.*(m)

That J. S., etc., on, etc., at, etc., being a person of evil disposition, and contriving and intending unlawfully, fraudulently, and deceitfully to cheat and defraud one H. S. G., an honest and worthy citizen of the commonwealth, on, etc., did falsely, knowingly, unlawfully, and designedly pretend to the said H. S. G. that a certain note, partly written and partly printed, which he the said J. S. then and there produced and delivered to the said H. S. G., and which said note was and is as follows, that is to say (*here set out note*), was a good and valuable promissory note for the payment of money, called a bank note, issued by the Commercial Bank of Millington, and that the said Commercial Bank of Millington was a good and solvent bank; by means of

(m) This form is given by Judge Lewis, Criminal Law, p. 647. See *R. v. Philpotts*, 1 C. & K. 112; *R. v. Barnard*, 7 C. & P. 784; *R. v. Spencer*, 3 C. & P. 420; and see also particularly, note to 526.

which said false pretences the said J. S. did then and there unlawfully obtain from the said H. S. G. one rifle, of the value of nine dollars, lawful money, of the property of him the said H. S. G., and one dollar, lawful money, of the moneys of him the said H. S. G., with intent to cheat and defraud him, the said H. S. G., of the same. Whereas, in truth and in fact, the said promissory note for the payment of money, called a bank note, issued by the Commercial Bank of Millington, was not a good and valuable promissory note for the payment of money, and was of no value whatever. And whereas, in truth and in fact, the said Commercial Bank of Millington was not a good and solvent bank, which he the said J. S. then and there at the time of the false pretences aforesaid well knew, to the great damage and deception of the said H. S. G., to the evil example of all others in like case offending, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(537) *Pretence that a flash note was good.*(n)

That A. B., etc., on, etc., at B. aforesaid, in the county aforesaid, unlawfully, knowingly, and designedly did falsely pretend to C. D. that a certain printed paper then produced by the said A. B. and offered and given by him to the said C. D. in payment for certain pigs, before then agreed to be sold by the said C. D. to the said A. B., was a good and valid promissory note for the payment of fifty dollars, by means of which said false pretence the said A. B. did then and there unlawfully, knowingly, and designedly obtain from the said C. D. five pigs, of the value of five dollars each, and certain money, to wit, the sum of twenty-five dollars, of the goods, chattels, and moneys of the said C. D., with intent then and there to cheat and defraud the said C. D. of the same. Whereas, in truth and in fact, the said printed paper was not a good and valid promissory note for the payment of the sum of fifty dollars, or for the payment of any sum whatever, as the said A. B. then and there well knew; contrary to the form of the statute in such case made and provided, etc. (*Conclude as in book 1, chapter 3.*)

(n) *R. v. Coulson*, 1 Den. C. C. 592; 1 Temp. & Mew, C. C. 592; 4 Cox, C. C. 227. See Wh. Cr. L. 8th ed. §§ 1162, 1164, 1217, 1233.

(538) *Pretence that a worthless check or order was good.*(o)

That A. B., etc., on, etc., at, etc., being a person of a deceitful and subtle mind and disposition, and intending to cheat and defraud one W. M., did unlawfully, falsely, and wickedly pretend to the said W. M. that a certain paper writing, which he the said defendant then and there produced to the said W. M., and which was as follows:—

“£25.

6th January, 1837.

To Messrs. S. & Co., bankers, Bristol. Pay the bearer twenty-five pounds.
R. C. C. S. P.”

was a good and genuine order for the payment of the said twenty-five pounds, and of the value of twenty-five pounds; whereas, in truth and fact (*negating the pretence*), which he the said defendant then and there well knew, by means of which said false pretence, etc. (*stating the thing obtained*).

(539) *Another form for same.*

That A. B., etc., on, etc., at, etc., did go to a certain shop of one B. M. there situate, and then and there unlawfully, knowingly, and designedly did falsely pretend to the said B. M., that, if he, the said B. M., would send a pair of candlesticks of him the said B. M. (which the said B. M. then showed to the said A. B.), the next day to him, the said A. B., to his lodgings at, etc., with a bill and receipt, he the said A. B. would pay for them upon the delivery, by giving said B. M. an order for the payment of money, which he the said A. B. then and there falsely pretended was in his possession, by means of which said false pretence he the said A. B., afterwards, to wit, on, etc., aforesaid, at, etc., aforesaid, unlawfully, knowingly, and designedly did obtain from the said B. M. one pair of candlesticks, of the value of, etc., of the goods, wares, and merchandises of him the said B. M., with intent then and there to cheat and defraud him of the same; whereas, in truth and in fact, when he the said B. M., on the day and year aforesaid, sent the said goods, etc., to the said lodgings of him the said A. B., at, etc., aforesaid, with a bill

(o) *R. v. Parker*, 7 C. & P. 825. This is the substance of the fourth count in this case, on which a majority of the judges held the conviction right.

and receipt, he the said A. B. did not pay for them upon the delivery by a valid order for the payment of money or otherwise, but did then and there unlawfully, knowingly, designedly, fraudulently, and deceitfully deliver to W. J., a servant of him the said B. M., sent by the said B. M. to the said A. B. with the said goods, etc., and who delivered the same to him with a bill and receipt, a certain paper writing, purporting to be an order for the payment of money, *subscribed A. B.*, purporting to bear date the, etc., and to be directed to P. and Q., bankers and partners, by the name and description of, etc., for the payment of, etc., to Messrs. R. and M., or bearer, he the said A. B. then and there *well knowing(p)* the same to be of no value, and that the same would not be paid. And whereas, in truth and in fact, the said A. B. had not, at the time of the false pretence aforesaid, in his possession or power, any valid order for the payment of money whatsoever, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

And the jurors, etc., that the said A. B., on, etc., did fraudulently inform and promise the said B. M., that if he the said B. M. would send a pair of candlesticks of the said B. M., which he the said B. M. then showed to the said A. B., the next day to him the said A. B. to his lodgings at, etc., with a bill and receipt, he the said A. B. would pay for them upon the delivery. And the jurors, etc., that the said A. B. did then and there, to wit, on, etc., at, etc., deliver to W. J., then being the servant of the said B. M., and then having the said candlesticks in his possession, a certain paper writing, purporting to be an order for payment of money, *subscribed, etc. (as in last count)*, and then and there unlawfully, knowingly, and designedly did falsely pretend to the said W. J. that he, the said A. B., then kept cash with the said P. and Q., and that they were then his bankers, and that the sum of, etc., mentioned in the said paper writing, purporting to be an order for payment of money, would be duly paid by them; by means of which said last mentioned false pretences;

(p) It must be shown to be A. B.'s handwriting, and that he knew it to be worthless. *Wickham v. R.* (in error), 10 A. & E. 34; 2 Per. & Da. 333, S. C.; *R. v. Philpotts*, C. & K. 112. See *R. v. Jackson*, Dickinson's Q. S. 332, n.

the said A. B. did then and there, to wit, at, etc., unlawfully, knowingly, and designedly obtain from the said W. J. one pair of candlesticks, of the value, etc., the goods, etc., of the said B. M., with intent then and there to defraud him of the same; whereas, in truth and in fact, the said A. B. did not then keep cash with P. and Q., nor were they then his bankers, nor was the sum of, etc., mentioned in the said paper writing, purporting to be an order for payment of money, duly paid by them, nor hath the same, or any part thereof been paid by them, or him the said A. B., or any person or persons whomsoever; and whereas, in truth and in fact, the said A. B. then and there well knew that the said paper writing, purporting to be an order for payment of money, was of no value, and was fabricated by him on purpose to cheat and defraud the said A. B., and that the sum of money therein mentioned would not be paid, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(539a) *Pretence that a certificate of stock was genuine.*

That the defendant at, etc., on, etc., being a person of an evil disposition, and devising and intending by unlawful ways and means to obtain and get into his hands and possession the goods, merchandise, chattels, and effects of the honest and good citizens of this commonwealth, and with intent to cheat and defraud one J. F., and with the view and intent to effect the loan hereinafter mentioned, did then and there unlawfully, knowingly, and designedly falsely pretend and represent to said J. F. that a certain paper writing and certificate which he, the said C., then and there had and produced to said F., and which was of tenor following, to wit:—

“No. 59. Eastern Railroad Company. 100 shares.

“Be it known, that J. F., of Boston, is a proprietor of one hundred shares in the capital stock of the Eastern Railroad Company, subject to all assessments thereon, and to the provisions of the charter and the by-laws of the corporation, the same being transferable by an assignment thereof in the books of the corporation, or by a conveyance in writing recorded in said books; and when a transfer shall be made or recorded in the books of the corpora-

tion, and this certificate surrendered, a new certificate or certificates will be issued.

“Dated at Boston, this third day of January, A.D. 1873.

[SEAL]

THORNTON K. LOTHROP,

President.

JOHN B. PARKER,

Treasurer,”

was then and there a good, valid, and genuine certificate of ownership of stock in said company, lawfully and duly issued and signed by said L. and P., and was then and there of the value of ten thousand dollars. And the said F. then and there, believing the said false pretences and representations, so made as aforesaid by the said C., and being deceived thereby, was induced, by reason of the false pretences and representations so made as aforesaid, to loan and deliver, and did then and there loan and deliver to the said C., upon the security and pledge of the said certificate, then and there by said C. delivered to said F. as such security for said loan, the sum of seven thousand dollars, one check and order for the payment of money of the value of seven thousand dollars, one piece of paper of the value of seven thousand dollars, of the proper moneys, goods, merchandise, chattels, and effects of said F. And the said C. did then and there receive and obtain the said moneys, goods, merchandise, chattels, and effects of the said F. as such loan, by means of the false pretences and representations aforesaid, and with intent to cheat and defraud the said F. of the same moneys, goods, and merchandise, chattels, and effects. Whereas, in truth and in fact, said writing and certificate was not then and there a good, valid, and genuine writing and certificate of ownership of stock in said company, duly and lawfully issued and signed by said L. and P., but was then and there a false, forged and counterfeit writing and certificate, and was not then and there of the value of ten thousand dollars, but was then and there of no value, all of which he the said C. then and there well knew. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said C., by means of the false pretences aforesaid, on, etc., at, etc., unlawfully, knowingly, and designedly did receive and obtain from the said F. the said moneys, goods, merchandise, chattels, and effects, of the proper moneys, goods, merchandise, chattels, and effects of the

said F., with intent to defraud him of the same, against, etc.(q)
(Conclude as in book 1, chapter 3.)

(540) *Obtaining goods by check on a bank where the defendant had no effects.*(r)

That A. B., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord at B. aforesaid, in the county aforesaid, unlawfully, knowingly, and designedly did falsely pretend to C. D. that a certain paper writing produced by the said A. B. to the said C. D., and purporting to be a check drawn by the said A. B. upon E. F. and Company, bankers, for the payment to the bearer of the sum of one hundred dollars, was then and there a good, genuine, and available order for payment of the sum of one hundred dollars, and was then and there of the value of one hundred dollars, which said check is of the tenor following, that is to say, etc.; and that the said A. B. kept an account with the said E. F. and Company, and that the said A. B. had money in the hands of the said E. F. and Company for the payment of the said check, and that the said A. B. had full power, right, and authority to draw checks upon the said E. F. and Company, by means of which said false pretences the said A. B. did then and there unlawfully, knowingly, and designedly obtain from the said C. D. a gold watch, of the value of seventy-five dollars, and a gold chain of the value of twenty-five dollars, of the goods and chattels of the said C. D., with intent then and there to cheat and defraud the said C. D. of the same. Whereas, in truth and in fact, the said paper writing was not then and there a good, genuine, and available order for payment of the sum of one hundred dollars, nor was the same then and there of the value of one hundred dollars; and whereas, in truth and in fact, the said A. B. did not keep any account with the said E. F. and Company; and whereas, in truth and in fact, the said A. B. had not any money in the hands of the said E. F. and Company for the payment of the said check; and

(q) Sustained in *Com. v. Coc*, 115 Mass. 481. See Wh. Cr. L. 8th ed. §§ 887, 1176, 1184, 1186, 1196, 1221.

(r) See *R. v. Jackson*, 3 Campbell, 370; 6 Cox, C. C. Appendix, page 1. "This indictment is framed with reference to *Rex v. Parker*, 2 Moody, C. C. 1; 7 Carrington & Payne, 825; and Mr. Greaves's note in his edition of Russell on Crimes, vol. ii. p. 300, note (f)." Ib.

whereas, in truth and in fact, the said A. B. had not any power, right, or authority to draw checks upon the said E. F. and Company, as the said A. B. then and there well knew; contrary to the form of the statute in such case made and provided.

(540a) *Pretence of authority to draw a certain cheque, etc.*

The jurors for, etc., upon their oath present, that B. F. P. did, on, etc., unlawfully, knowingly, and designedly falsely pretend to H. H. and C. H., carrying on business in partnership as tailors, under the name and style of Messrs. H. Brothers, that he, the said B. F. P., had authority to draw a certain cheque, to wit, a cheque for the sum of £10 sterling, upon the W. and D. Banking Company in, etc., and that a sum of £10 sterling, belonging to him, the said B. F. P., was then in the possession of the said banking company, and that a sum of £10 sterling was then payable and could be paid by the said banking company on the credit and on the account of the said B. F. P., as soon as an order in writing, signed by the said B. F. P., authorizing the said banking company to make such payment, should be presented at the place of business of the said banking company at, etc.; and that a certain paper writing, in the proper handwriting of the said B. F. P., was a good and valid order for the payment of £10 sterling, and of the value of £10 sterling, and that a certain banker's cheque, bearing a stamp of 1*d.*, and filled up for a sum of £10 sterling, was a good and valid security for the sum of £10 sterling, and of the value of £10 sterling; and that a certain cheque, which was then written and made by the said B. F. P. upon one of the printed and stamped forms of the W. and D. Banking Company, and which said cheque was addressed to the said banking company, at their place of business in, etc., and which said cheque purported to be an order upon the said banking company to pay to him, the said B. F. P., and any indorsee of him, the said B. F. P., the sum of £10 sterling, and which said cheque was indorsed by the proper signature of him, the said B. F. P., was a valuable security, to wit, an order for the payment of £10 sterling, and of the value of £10 sterling; by means of which said false pretences the said B. F. P. did then and there unlawfully obtain from the said firm of Messrs. H. Brothers the sum of £10 in money, of the

moneys of the said Messrs. H. Brothers, with intent thereby then to defraud; whereas, in truth and in fact, the said B. F. P. had not any authority to draw the said cheque upon the said banking company for the sum of £10, or any other cheque for any sum of money whatsoever; and whereas, in truth and in fact, the said banking company had not then in their possession a sum of £10 sterling belonging to the said B. F. P., or any other sum of money whatsoever; and whereas, in truth and in fact, a sum of £10 sterling was not then payable by said banking company upon the order of the said B. F. P., or any other sum of money whatsoever; nor could £10 sterling, or any other sum of money, be paid by the said banking company upon the credit and account of the said B. F. P. when any written order of the said B. F. P. was presented to the said banking company; and whereas, in truth and in fact, the said paper writing was not a good and valid order for the payment of £10 sterling, and was not of the value of £10, but, on the contrary, was invalid, and not of any value whatsoever; and whereas, in truth and in fact, the said banker's cheque was not a good and valid security for the sum of £10 sterling, or any other sum whatsoever, and was not of the value of £10 sterling, or of any other sum whatsoever; and whereas, in truth and in fact, the said cheque so written, made, and indorsed by the said B. F. P., was not a valuable security, and was not of the value of £10 sterling, but, on the contrary, was not of any value whatsoever; as he, the said B. F. P., then and there well knew; to the great damage and disgrace of the said Messrs. H. Brothers, against, etc. (*Conclude as in book 1, chapter 3.*)

(Here follow three additional counts, varying the statement.)(s)

(541) *Pretence that defendant was the agent of A. B., and as such had been sent by A. B. to C. D., to receive certain money due from the latter to the former.*(t)

That F. C., etc., on, etc., at, etc., being a person of an evil disposition, and devising and intending by unlawful ways and

(s) 11 Cox, C. C. App. xi.

(t) This form was sustained in *Com. v. Call*, 21 Pick. 515. Morton, J., said: "But without stopping to inquire whether such an indictment would be good at

means to obtain and get into his hands and possession the goods, merchandise, chattels, and effects of the honest and good citizens of this commonwealth, and with intent to cheat and defraud one A. W. and one G. S. of their money, did then and there unlawfully, knowingly, and designedly falsely pretend and represent to one C. A. P., a person who owed a sum to said W. and S., to wit, the sum of eleven dollars and sixty-three cents, that the said C. then and there was an authorized collector and a servant of said W. and S., that said W. and S. had employed and sent him to collect and receive for them said sum of money so due as aforesaid, and owed by the said C. A. P. to them. And the said C. A. P., then and there believing the said false pretences and representations so made as aforesaid by the said C., and being deceived thereby, was induced, by reason of the false pretences and representations so made as aforesaid, to deliver, and did then and there deliver, to the said F. C., the sum of eleven dollars sixty-three cents, due and owing from him said P., to said W. and S., of the proper money and effects of said P. due and owing as aforesaid to said W. and S., and the said C. did then and there receive and obtain the said money and effects of the said P., due and owing as aforesaid to said W. and S., by means of the false pretences and representations aforesaid, and with the intent to cheat and defraud the said P. and said W. and S. of the same money and effects; whereas, in truth and in fact, said F. C. then and there was not an authorized collector and a servant of said W. and S., and the said W. and S. had not then and there employed and sent, and did not then and there employ and send, said C. to collect and receive for them said sum of money so due and owing as aforesaid from said C. A. P. to them, but had forbidden said C. to collect any money and receive any for them, and had long before turned him

common law or not, we are all satisfied that this is a good indictment under the statute.

“The grammatical and critical objections, however ingenious and acute they may be, cannot prevail. The age has gone by when bad Latin or even bad English, so it be sufficiently intelligible, can avail against an indictment, declaration, or plea. The passage objected to may be somewhat obscure, but, by a reference to the context, is capable of a pretty certain interpretation. The pronoun *them* must be referred to that antecedent to which the tenor of the instrument and the principles of law require that it should relate, whether exactly according to the rules of syntax or not.”

out of their employment ; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said F. C., by means of the false pretences aforesaid, on, etc., at, etc., unlawfully, knowingly, and designedly did receive and obtain from said C. A. P. said sum of eleven dollars and sixty-three cents, being the said money due and owing as aforesaid, and effects of the proper money and effects of the said P., due, owing, and payable to said W. and S., with intent to defraud them of the same, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(541a) *Pretence that defendant had been sent to obtain certain goods.*

That J. M., etc., “falsely pretended to E. S., with intent to defraud, that he, the said J. M., had been sent by E. M. to him, the said E. S., to get a violin, tenor horn, and a B-flat horn for the said E. M. ; and by means of such false pretence obtained from the said E. S. one violin, one tenor horn, and one B-flat horn of the value of ten dollars ; whereas, etc., against,” etc.(u) (*Conclude as in book 1, chapter 3.*)

(541b) *Falsely pretending that defendant acted as broker for an undisclosed principal.(v)*

That A. B., etc., at, etc., on, etc., with intent to cheat and defraud G. M. B. and H. H. of and out of certain sound linseed, which they, the said G. M. B. and H. H., then and there had, possessed, and owned, did then and there unlawfully, knowingly, and designedly falsely pretend and represent to said B. and H. that he, the said A. B., was then and there a merchandise broker, and that he had received, and then and there had in his capacity as merchandise broker as aforesaid, an order from certain persons in New York, meaning thereby the city of New York, in the state of New York, whose names the said A. B. did not then and there disclose to the said B. and H., and whose names are to the said jurors unknown, then and there to purchase in behalf of said persons a large quantity of sound linseed, to wit, two thousand bags of sound linseed, at the price of three

(u) Under this indictment it was held not necessary to aver the name of the person intended to be injured or defrauded. *Mack v. State*, 63 Ala. 138.

(v) Sustained in *Com. v. Jeffries*, 7 Allen, 548. See Wh. Cr. L. 8th ed. §§ 1180, 1215, 1227.

dollars for each bushel of said sound linseed, and the said A. B. then and there falsely offered, in his said capacity as merchandise broker, in behalf of said persons, and in pursuance of the order which he, the said A. B., then and there falsely pretended and represented that he, in his capacity as merchandise broker, had received and had as aforesaid, to the said B. and H., to purchase of them two thousand bags of sound linseed, which they, the said B. and H., then and there had, owned, and possessed, at the price of three dollars for each bushel of said sound linseed, and they, the said B. and H., then and there having and desiring to sell two thousand bags of sound linseed, at the price of three dollars for each bushel of said sound linseed, and then and there believing the said false pretences, representations, declarations, and offer so falsely made as aforesaid by the said A. B. to be true, and being deceived thereby, were induced, by reason of the said false pretences, representations, declarations, and offer so falsely made as aforesaid, then and there to accept the offer so falsely made as aforesaid by the said A. B. to them, the said B. and H., as aforesaid, and then and there agree to sell to the said persons from whom the said A. B. falsely pretended and represented that he the said A. B., in his said capacity as merchandise broker, had received an order to purchase a large quantity of sound linseed, to wit, two thousand bags of sound linseed, at the price of three dollars for each bushel of said sound linseed as aforesaid, and then and there induced, by reason of the false pretences, representations, declarations, and offer so falsely made as aforesaid by the said A. B., did sell to the said persons from whom the said A. B. falsely pretended and represented that he, the said A. B., in his said capacity as merchandise broker, had received said order to purchase two thousand bags of sound linseed, at the price of three dollars for each bushel of said sound linseed; and they, the said B. and H., were also then and there induced, by reason of the false representations, declarations, and offer so falsely made as aforesaid, to deliver, and then and there being so induced, did deliver, in pursuance of their acceptance of the offer aforesaid, falsely made as aforesaid, and of their agreement aforesaid, induced by the said false pretences, declarations, representations, and offer so falsely made as aforesaid, and of their sale aforesaid, induced and made as aforesaid

to the said A. B., in his said capacity as merchandise broker, two thousand bags of sound linseed, at the price of three dollars for each bushel of said sound linseed, each of the said bags of sound linseed then and there containing three and a half bushels of sound linseed, and each bag of said sound linseed being then and there of the value of eleven dollars and fifty cents, and being then and there of the property of the said B. and H.; and the said A. B. did then and there, in his said capacity as merchandise broker, receive the said two thousand bags of sound linseed, and each bag thereof, at the price of three dollars for each bushel of said sound linseed, in pursuance of the said sale and delivery as aforesaid; and the said A. B. did then and there, in his said capacity as merchandise broker, make the said false pretences, representations, declarations, and offer as aforesaid to the said B. and H., to induce the said B. and H. to sell to the persons hereinbefore described, and to deliver to him, the said A. B., in his said capacity as merchandise broker, the said two thousand bags of sound linseed, and each bag thereof, in manner and form aforesaid, and the said A. B., in his said capacity as merchandise broker, did then and there receive and obtain from the said B. and H. the said two thousand bags of sound linseed, and each bag thereof, of the value aforesaid, of the property of them, the said B. and H., by means of the said false pretences, representations, declarations, and offer so falsely made as aforesaid, and with intent to cheat and defraud. Whereas, in truth and fact, the said A. B. had not then and there, in his said capacity as merchandise broker, or otherwise, received, and did not then and there, in his said capacity as merchandise broker, or otherwise, have an order from said persons in New York, or from any other person or persons anywhere, for the purchase, in his capacity as merchandise broker, or otherwise, in behalf of said persons, or in behalf of any one, of a large quantity of sound linseed, to wit, of two thousand bags of sound linseed, or of any sound linseed; and did not then and there, in his said capacity of merchandise broker, or otherwise, have from said persons, or from any person or persons, an order for the purchase in behalf of said persons, or in behalf of any one, of any linseed of sound quality or otherwise at the price of three dollars for each bushel of said sound linseed, as the said A. B. then and there well knew.

And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said A. B., by means of the false pretences aforesaid, on, etc., at, etc., in his said capacity of merchandise broker as aforesaid, unlawfully, knowingly, designedly, and fraudulently did obtain and receive from the said B. and H. the said sound linseed, of the value aforesaid, of the property of the said B. and H., with intent to cheat and defraud as aforesaid, etc. (*Conclude as in book 1, chapter 3.*)

(542) *Pretending to be clerk of a steamboat, and authorized to collect money for the boat.*

That A. B., on the first day of November, in the year of our Lord one thousand eight hundred and forty-six, in the county of Hamilton aforesaid, unlawfully did falsely pretend to one M. N., that he the said A. B. then was clerk of the steamboat "Harlem," and as such, that the said A. B. was then and there entitled to receive from the said M. N. and O. P., Q. R. and S. T. (the said M. N., O. P., Q. R., and S. T. then and there being partners under the name and firm of N., S. & Co.), a large sum of money, to wit, the sum of twenty-four dollars and ninety-four cents, on account of and for freight and charges due the said steamboat "Harlem," by means of which said false pretences, he the said A. B. then and there unlawfully did obtain from the said M. N., O. P., Q. R., and S. T., a large sum of money, to wit, the said sum of twenty-four dollars and ninety-four cents, of the moneys and effects of the said M. N., O. P., Q. R., and S. T., with intent then and there to cheat and defraud the said M. N., O. P., Q. R., and S. T. of the said sum of money; whereas, in truth and in fact, the said A. B. was not then such clerk as aforesaid, nor was the said A. B. then entitled to receive said sum of money, or any part thereof, from the said M. N., O. P., Q. R., and S. T., or either of them, and the said A. B., at the time he so falsely pretended as aforesaid, well knew the said false pretences to be false, etc.(w)

(w) Warren's C. L. 233.

(543) *Pretence made to a tradesman that defendant was a servant to a customer, and was sent for the particular goods obtained.*(x)

That A. B., etc., on, etc., at, etc., contriving and intending unlawfully, fraudulently, and deceitfully to cheat and defraud one C. D. of his goods, wares, and merchandises, on, etc., at, etc., aforesaid, unlawfully, knowingly, and designedly did falsely pretend to the said C. D., that he the said A. B. then was the servant of one C. Q., of, etc., tailor (the said C. Q. then and long before being well known to the said C. D., and a customer of the said C. D. in his said business and way of trade), and that he the said A. B. was sent by the said C. Q., to the said C. D., for ten yards of certain superfine woollen cloth, by which said false pretence the said A. B. did then and there, to wit, on, etc., at, etc., aforesaid, unlawfully, knowingly, and designedly obtain from the said C. D. ten yards of superfine woollen cloth of the value of fifteen pounds, of the goods, wares, and merchandises of the said C. D.,(y) with intent then and there to cheat and defraud him the said C. D. of the same, whereas, in truth and in fact, the said A. B. was not then the servant of the said C. Q., and whereas, he the said A. B. was not then, or ever hath been, sent by the said C. Q. to the said C. D. for the said cloth, or for any cloth whatsoever, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(544) *Another form for same.*(z)

That J. S., etc., on, etc., at, etc., intending, etc., unlawfully, knowingly, and designedly did falsely pretend to one J. N., that the said J. S. then was the servant of one R. O., of St. Paul's Churchyard, in the city of London, tailor (the said R. O. then and long before being well known to the said J. N., and a customer of the said J. N. in his business and way of trade as a woollen draper), and that the said J. S. was then sent by the

(x) Dickinson's Q. S. 335.

(y) This is essential. *R. v. Parker*, 3 Q. B. 292; *R. v. Norton*, 8 C. & P. 196. The want of the averment will occasion indictment to be quashed (by four judges), S. C., for it is not cured by verdict under 7 Geo. IV. c. 64, s. 21. See *Martin v. R.* (in error), 3 N. & P. 472; 8 A. & E. 481; *R. v. Douglass*, Dickinson's Q. S. 337.

(z) Archbold's C. P. 5th Am. ed. 345.

said R. O. to the said J. N. for five yards of superfine woollen cloth, by means of which said false pretences the said J. S. did then and there unlawfully obtain from the said J. N. five yards of superfine woollen cloth, of the value of five pounds, of the goods ("any chattel, money, or valuable security,")(a) of the said J. N., with intent then and there to cheat and defraud him the said J. N. of the same; whereas, in truth and in fact, the said J. S. was not then the servant of the said R. O.; and whereas, in truth and in fact, the said J. S. was not then, or at any other time, sent by the said R. O. to the said J. N. for the said cloth, or for any cloth whatsoever, to the great damage and deception of the said J. N., to the evil example of all others in the like case offending, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(544a) *Pretence that defendant was asked by "a person living in a large house down the street," etc., to buy carpet of prosecutor.*(b)

That A. B., on, etc., at, etc., unlawfully, knowingly, and designedly did falsely pretend to one G. S. that a certain person who lived in a large house down the street, and had had a daughter married some time back, had been at him the said A. B. about some carpet, and had asked him, the said A. B., to procure a piece of woollen carpet, to wit, about twelve yards; by means of which said false pretences the said A. B. did then and there unlawfully obtain from the said G. S. twenty yards of woollen carpet, of the goods and chattels of the said G. S., with intent thereby then to defraud, etc.; whereas, in truth and fact, no such person as aforesaid had then, or at any other time, been at the said A. B. about any carpet, nor had any such person as aforesaid asked the said A. B. to procure any piece of woollen carpet whatsoever, to the great damage and deception of the said G. S., to the evil example, etc. (*Conclude as in book 1, chapter 3.*)

(a) See 7 & 8 Geo. IV. c. 29, s. 5.

(b) Sustained in *R. v. Burnside*, 8 Cox, C. C. 370; Bell, 282; Wh. Cr. L. 8th ed. §§ 1139, 1165.

(545) *Pretence that the defendant was entitled to grant a lease of certain freehold property.*(c)

That P. F., late of B., in the county of Middlesex, laborer, on the first day of June, in the year of our Lord at B. aforesaid, in the county aforesaid, and within the jurisdiction of the central criminal court, unlawfully and knowingly did falsely pretend to one B. E., that the said P. F. then was the freeholder of a certain messuage and premises situate and being in Church street, in B. aforesaid, in the county aforesaid, and that the said P. F. then had a good and sufficient right, title, estate, and interest in the said messuage and premises to entitle and enable the said P. F. to grant to the said B. E. a lease of the said messuage and premises for a term of twenty years, and that the said P. F. then had power to grant the said lease to the said B. E., and to give to the said B. E. a good and valid title to the said messuage and premises for the said term of twenty years; by means of which said false pretences the said P. F. did then and there unlawfully and fraudulently obtain from the said B. E. thirty pieces of the current gold coin of this realm called sovereigns, ten pieces of the current silver coin of this realm called shillings, and one promissory note of the governor and company of the Bank of England, for the payment of ten pounds, of the moneys of the said B. E., with intent then and there to cheat and defraud him of the same; whereas, in truth and in fact, the said P. F. was not at the time he so falsely pretended as aforesaid the freeholder of the said messuage and premises, or of any part thereof, nor had he then any freehold estate whatever in the said messuage and premises, or in any part thereof, as the said P. F. then well knew; and whereas, in truth and in fact, the said P. F. had not, at the time he so falsely pretended as aforesaid, a sufficient right, title, estate, or interest to entitle or enable him to grant any lease of the said messuage and premises for a term of twenty years, or any lease whatever of the said messuage and premises, or any part thereof, as the said P. F. then well knew; and whereas, in truth and in fact, the said P. F. had not, at the time he so falsely

pretended as aforesaid, any right, title, estate, or interest whatever in or to the said messuage and premises, nor had he then power to grant the said lease to the said B. E., or to give to the said B. E. any title to the said messuage and premises for the said term of twenty years, or for any term of years whatever, or any title whatever to the said messuage and premises, or any part thereof; to the great damage of the said B. E., and contrary to the form of the statute in such case made and provided, and against the peace, etc.

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that, before and at the time of the committing of the offence hereinafter next mentioned, one J. L. was the owner and proprietor of the said messuage and premises in the said first count of this indictment mentioned. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said P. F., on the day aforesaid, in the year aforesaid, at B. aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, unlawfully and knowingly did again falsely pretend to the said B. E. that the said P. F. then was the freeholder of the said messuage and premises, and that the old gentleman to whom the premises formerly belonged, meaning the said J. L., had died, and had left the said P. F. everything, and that the said P. F. then had a sufficient estate and interest in the said messuage and premises to entitle and enable him to grant, and then had power to grant to the said B. E. a lease of the said messuage and premises for a term of twenty years; by means of which said false pretences in this count mentioned, the said P. F. did then and there unlawfully and fraudulently obtain from the said B. E. thirty pieces of the current gold coin of this realm called sovereigns, ten pieces of the current silver coin of this realm called shillings, and one promissory note of the governor and company of the Bank of England, for the payment of ten pounds, of the moneys of the said B. E., with the intent then and there to cheat and defraud him of the same; whereas, in truth and in fact, the said P. F. was not at the time he so falsely pretended, as in this count mentioned, the freeholder of the said messuage and premises, or any part thereof, nor had he then any freehold in the said messuage and

premises, or in any part thereof, as the said P. F. then well knew ; and whereas, in truth and in fact, at the time the said P. F. so falsely pretended as last aforesaid, the said J. L. had not died, as the said P. F. then well knew ; and whereas, in truth and in fact, the said P. F. had not at the time he so falsely pretended as last aforesaid a sufficient estate or interest in the said messuage and premises to entitle or enable him to grant, nor had he then any power to grant any lease for a term of twenty years, or any lease whatever, of the said messuage and premises, or of any part thereof, as the said P. F. then and there well knew ; to the great damage of the said B. E., contrary to the form of the statute in such case made and provided, and against the peace, etc.

(546) *Pretence that the defendant was the authorized agent of the Executive Committee of the Exhibition of the Works of Industry of all Nations, and that he had power to allot space to private individuals for the exhibition of their merchandise.*(d)

That heretofore, and before the committing of the offence hereinafter next mentioned, to wit, on the twenty-fifth day of October, in the year of our Lord one thousand eight hundred and fifty, an application was made by Harriet Richardson, then being the wife of Thomas Richardson, to one Adam Young the younger, for a certain space, to wit, a space of four feet square, in a certain building then in the course of erection in Hyde Park, in the county of Middlesex, for the purpose of an exhibition intended to take place in the year of our Lord one thousand eight hundred and fifty-one, and called and known as the Great Exhibition of the Works of Industry of all Nations, for the purpose of enabling the said Harriet Richardson to exhibit certain articles, to wit, stays, at the said exhibition. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Adam Young the younger, late of the parish of Saint Dunstan in the East, in the city of London, laborer, afterwards, to wit, on the day aforesaid, in the year aforesaid, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the central criminal court, unlawfully, knowingly, and designedly did falsely pretend to the said Harriet Richardson that the said

Adam Young the younger then was an authorized agent for the purpose of granting space for the exhibition of articles at the said exhibition; and that the said Adam Young the younger then was the only person who had the power to grant space to the said Harriet Richardson for the exhibition of articles at the said exhibition; and that the said Adam Young the younger then had power to grant to the said Harriet Richardson the space so applied for by the said Harriet Richardson as aforesaid; by means of which said false pretences the said Adam Young the younger did then and there unlawfully obtain from the said Harriet Richardson three pieces of the current silver coin of this realm called half-crowns, two pieces of the current silver coin of this realm called shillings, and one piece of the current silver coin of this realm called a sixpence, of the moneys of the said Thomas Richardson, with intent then and there to cheat and defraud the said Thomas Richardson of the same; whereas, in truth and in fact, the said Adam Young the younger was not then an authorized agent for the purpose of granting, and had not any authority whatever to grant, space for the exhibition of articles at the said exhibition, or any space whatever in the said building, as the said Adam Young the younger then and there well knew; and whereas, in truth and in fact, the said Adam Young the younger was not then the only person who had power to grant space for the exhibition of articles at the said exhibition, as the said Adam Young the younger then and there well knew; and whereas, in truth and in fact, the said Adam Young the younger had not then any power, authority, or right whatever to grant space for the exhibition of articles at the said exhibition to the said Harriet Richardson, or to any other person whatever, or any space whatever in the said building to the said Harriet Richardson, or any other person, as the said Adam Young the younger then and there well knew; to the great damage of the said Thomas Richardson, contrary to the form of the statute in such case made and provided, and against the peace, etc.

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, and before the committing of the offence hereinafter next mentioned, to wit, on the day aforesaid, in the

year of our Lord one thousand eight hundred and fifty, an application was made by the said Harriet, the wife of the said Thomas Richardson, to the said Adam Young the younger, for a certain space, to wit, a space of four feet square, at the Great Exhibition, meaning thereby a space of four feet square in a certain building intended to be used as the building in which a certain exhibition, called and known as the Great Exhibition of the Works of Industry of all Nations, should take place, in the year of our Lord one thousand eight hundred and fifty-one, for the exhibition of certain articles, to wit, stays, at the said exhibition. And the jurors aforesaid do further present, that the said Adam Young the younger afterwards, to wit, on the day aforesaid, in the year of our Lord one thousand eight hundred and fifty, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the central criminal court, unlawfully, knowingly, and designedly did again falsely pretend to the said Harriet Richardson, that the said Adam Young the younger then had power to grant to the said Harriet Richardson space for the exhibition of articles at the said exhibition. And that the said Adam Young the younger then had power to grant to the said Harriet Richardson the said space, so applied for by the said Harriet Richardson as aforesaid, by means of which said last mentioned false pretences the said Adam Young the younger did then and there unlawfully obtain from the said Harriet Richardson three other pieces of the current silver coin of this realm called half-crowns, two other pieces of the current silver coin of this realm called shillings, and one other piece of the current silver coin of this realm called a sixpence, of the moneys of the said Thomas Richardson, with intent then and there to cheat and defraud the said Thomas Richardson of the same; whereas, in truth and in fact, the said Adam Young the younger had not then any power or right whatsoever to grant space for the exhibition of articles at the said exhibition to the said Harriet Richardson, or to any other person whatever, or any space whatever in the said building to the said Harriet Richardson, or any other person, as the said Adam Young the younger then and there as last aforesaid well knew; to the great damage of the said Thomas Richardson, against the form

of the statute in such case made and provided, and against the peace, etc.

Third count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that, before the committing of the offence hereinafter next mentioned, to wit, on the day aforesaid, in the year of our Lord one thousand eight hundred and fifty, an application was made by the said Thomas Richardson to the said Adam Young the younger for a certain space, to wit, a space of four feet square, in the building intended for the proposed Great Exhibition of one thousand eight hundred and fifty-one, meaning hereby the Great Exhibition of the Works of Industry of all Nations, intended to be holden in the year of our Lord one thousand eight hundred and fifty-one. And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, and before the making of the said last mentioned application, an executive committee for carrying out the said exhibition had been and was duly appointed for the purpose of carrying out the said exhibition, and that, amongst other things, the power of allotting space in the said last mentioned building to persons desirous of becoming exhibitors in the said exhibition had been, and was, vested and intrusted to the said committee. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Adam Young the younger afterwards, to wit, on the day aforesaid, in the year of our Lord one thousand eight hundred and fifty, at the parish aforesaid, in the city aforesaid, and within the jurisdiction aforesaid, unlawfully, knowingly, and fraudulently did again falsely pretend to the said Thomas Richardson, that the said Adam Young the younger was the only authorized agent of the commissioners, meaning thereby that he was the only authorized agent of the said executive committee for granting space, meaning thereby space in the said last mentioned building, and that the said Adam Young the younger then had power to allot to the said Thomas Richardson the space in the said building, so applied for by the said Thomas Richardson as last aforesaid, by means of which said last mentioned false pretences, the said Adam Young the younger did then and there, as last aforesaid, unlawfully attempt and en-

deavor unlawfully to obtain from the said Thomas Richardson a large sum of money, to wit, the sum of ten shillings, of the moneys of the said Thomas Richardson, with intent then and there to cheat and defraud him thereof; whereas, in truth and in fact, the said Adam Young the younger was not, at the time he so falsely pretended as last aforesaid, an authorized agent of the said executive committee for granting space in the last mentioned building, as he the said Adam Young the younger then and there as last aforesaid well knew; and whereas, in truth and in fact, the said Adam Young the younger had not, at the time he falsely pretended as aforesaid, any power, authority, or right whatsoever, to allot any space whatever in the said last mentioned building to the said Thomas Richardson, or to any other person, as he the said Adam Young the younger, at the time he so falsely pretended as last aforesaid, well knew; to the great damage of the said Thomas Richardson, and against the peace, etc.

Fourth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that before the committing of the offence next hereinafter mentioned, to wit, on the day aforesaid, in the year of our Lord one thousand eight hundred and fifty, an application was made by the said Thomas Richardson to the said Adam Young for a certain space, to wit, the space of four feet square, in the building intended for the proposed Great Exhibition, to be holden in the year of our Lord one thousand eight hundred and fifty-one, to wit, the proposed Great Exhibition of Works of Industry of all Nations. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Adam Young the younger afterwards, to wit, on the day aforesaid, in the year of our Lord one thousand eight hundred and fifty, at the parish aforesaid, in the city and within the jurisdiction aforesaid, unlawfully, knowingly, and fraudulently did again falsely pretend to the said Thomas Richardson, that the said Adam Young the younger then, as last aforesaid, had power to allot to the said Thomas Richardson the space in the said last mentioned building, so applied for by the said Thomas Richardson as last aforesaid, by means of which said last mentioned false pretences the

said Adam Young the younger did then and there, as last aforesaid, unlawfully attempt and endeavor unlawfully to obtain from the said Thomas Richardson a large sum of money, to wit, the sum of ten shillings, of the moneys of the said Thomas Richardson, with intent then and there to cheat and defraud the said Thomas Richardson thereof; whereas, in truth and in fact, the said Adam Young the younger had not, at the time he so falsely pretended as last aforesaid, any power, authority, or right whatever, to allot any space whatever in the last mentioned building to the said Thomas Richardson, or to any other person, as the said Adam Young the younger, at the time he so falsely pretended as last aforesaid, well knew; to the great damage of the said Thomas Richardson, and against the peace, etc.

(547) *Pretence that prisoner was an unmarried man, and that, having been engaged to her, the prosecutrix, and the engagement broken off, he was entitled to support an action of breach of promise against her, by which means he obtained money from her.*(e)

That S. M. C., otherwise called S. M., etc., on, etc., unlawfully did falsely pretend to the said A. C., then and there being a single woman, that he was a single and unmarried man, and thereby then and there obtained a promise of marriage from the said C., to wit, a promise that in consideration that he would marry her she would marry him. And the jurors, etc., do further present, that the said A. C., afterwards, to wit, on the day and year, etc., wholly refused to marry the said S. M. C., otherwise called, etc. And the jurors, etc., do further present, that the said S. M. C., otherwise called, etc., afterwards, to wit, on the day and year, etc., unlawfully did falsely, knowingly, and designedly pretend to the said A. C. that he was, at the time of the said promise and refusal in this count mentioned, a single and unmarried man, and entitled to bring and maintain an

(e) *R. v. Copeland*, 1 C. & M. 516. In this case it was held by Lord Denham, C. J., and Maule, J., that the fact of the prisoner paying his addresses was sufficient evidence for the jury, on which they might find the first pretence that the prisoner was a single man and in a condition to marry; and by Maule, J., that this was sufficient evidence on which to find the falseness of the other pretence, that he was entitled to maintain his action for breach of promise of marriage, and that such latter false pretence was a sufficient false pretence within the statute. Wh. Cr. L. 8th ed. § 1148.

action for breach of the said promise of marriage against her the said A. C., by means of which said last mentioned false pretence in this count mentioned, the said S. M. C., otherwise called, etc., did then and there unlawfully obtain from the said A. C. one promissory note of the governor and company of the Bank of England, for the payment of one hundred pounds, etc. (*describing various kinds of money and securities*), of the property and moneys of the said A. C., with intent then and there to cheat and defraud her the said A. C. of the same; whereas, in truth and in fact, the said S. M. C., otherwise called, etc., was not, at the time of the said promise of marriage in this count mentioned, or at the time of the said refusal in this count mentioned, a single man or an unmarried man, nor was he, at either of those times or at any other time, entitled to bring or maintain an action for breach of the said promise of marriage against the said A. C., etc., against, etc. (*Conclude as in book 1, chapter 3.*)

(547a) *Pretence that a certain coat was a particular uniform, etc.*

The jurors for, etc., upon their oath present, that J. F. B., on, etc., unlawfully and knowingly did falsely pretend unto S. C., a station-master in the employment of the L., B., and S. C. R. Co., that the great-coat which he, the said J. F. B., then handed to the said S. C. was the same great-coat, and part of the uniform clothing which had been supplied to him the said J. F. B. by the said company. By means of which said false pretences the said J. F. B. did then unlawfully obtain from the said S. C. one pound in money, with intent to defraud. Whereas, in truth and in fact, the said great-coat was not the same great-coat, nor did it form part of the uniform clothing which had been supplied to him the said J. F. B. by the said company, against, etc.(f) (*Conclude as in book 1, chapter 3.*)

(f) It appeared in evidence on the trial of this indictment that the prisoner, J. F. B., on entering the service of the said company, signed a book of rules, a copy of which was given to him. One of the rules was: "No servant of the company shall be entitled to claim payment of any wages due to him on leaving the company's service until he shall have delivered up his uniform clothing." On leaving the service the prisoner knowingly and fraudulently delivered up to an officer of the company, as part of his own uniform, a great-coat belonging to a fellow servant, and so obtained the wages due to him. It was held, that the defendant was properly convicted of obtaining the money by false pretences. *R. v. Bull*, 13 Cox, C. C. 608.

- (548) *Pretence that defendants were the agents of P. H., who was the owner of certain stock and land, etc., the latter of which was in fact mortgaged.*(g).

That R. H. and J. C., etc., on, etc., at, etc., being persons of an evil disposition, and devising and intending by unlawful ways

(g) This form was sustained in *Com. v. Harley*, 7 Met. 464.

Dewey, J. : "As to the first exception taken to the instructions given to the jury, at the trial, we think the principle stated in *Young and others v. the King*, 3 T. R. 98, referred to by the counsel for the defendant, sustains the ruling, rather than the objection to it. The argument for the plaintiffs in error there was, that the words could not have been spoken by all, and that one of them could not be affected by words spoken by another, each being answerable for himself only. But it was held, that 'if they all acted together, and shared in the same transaction,' they committed the offence jointly. Grose, J., said: 'Every crime, which may be in its nature joint, may be so laid. Here it is stated that all the defendants committed this offence, by all joining in the same plan; they were all jointly concerned in defrauding the prosecutor of his money.' Now it seems to us, that if two may be indicted for the words spoken by one in the presence of the other, it appearing that they came to act in concert, it establishes the position that all which is necessary to cause the liability to attach to an individual of having participated in making false pretences, is his co-operation and acting in concert in the general purpose; and the concert and co-operation may be shown, although one said nothing by way of assenting to or expressing his concurrence in the false pretences. If this be so, it seems necessarily to follow that if A. procures B. to go to C., and with a false pretence, of which A. is conversant, to obtain the goods of C., A. is guilty in the matter of obtaining these goods by false pretences; and whether A. be outside or within the door of the shop of C. is immaterial; all that is necessary to be proved is, that he is at the time acting in concert with B., and aiding in putting forth the false pretences, and that the precise false pretences and representations charged in the indictment be made with his knowledge, concurrence, and direction. The instruction on this point was therefore correct.

"The next instruction to the jury, which is objected to, was in these words: 'It is not necessary for the government to prove that the defendants, or either of them, obtained the goods on their own account, or that they, or either of them, derived, or expected to derive, personally, any pecuniary benefit therefrom; but that if the jury were satisfied that the defendants obtained said goods by means of said false pretences, for the sole use and benefit of said P. Harley, this was sufficient to sustain the allegation in the indictment, that the defendants obtained said goods by said false pretences.'

"It is not contended by the defendant's counsel that it was necessary, in order to support the indictment, for the government to prove that the defendant intended any pecuniary gain or personal benefit. That the contrary is the rule is very clear, and was fully conceded in the argument. But the ground assumed is that of a variance between the matter set forth in the indictment, and the proof showing that the goods were obtained for the sole use of P. Harley. I should doubt, from the report of the case, whether the question of variance was distinctly raised at the trial. The point seems rather to have been, whether a party charged with obtaining goods by false pretences must not be shown to have obtained them thus for his own use or pecuniary benefit. If, however, we look at the question as one of variance, we think the exception cannot prevail. The only allegation which is supposed to conflict with the evidence that the goods were obtained for the use of P. Harley is this, that the defendants, 'devising

and means to obtain and get into their hands and possession the goods, merchandise, chattels, and effects of the honest and good citizens of this commonwealth, and with intent to cheat and defraud one G. B. B., one D. N., and one E. H. R. L., all of said Boston, Massachusetts, and copartners in trade, transacting business under the name, firm, and style of G. B. B. and Company, did then and there unlawfully, knowingly, and designedly falsely pretend and represent to said G. B. B. and Company, that they were in the employment of one P. H., of said Boston, trader; that said P. H. was possessed of, and was the rightful owner of the stock of goods which then were in a certain shop, situated at the corner of Hanover street and Union street in said Boston, and was solvent and in good credit, and they were authorized to buy goods in the name of said P. H. by said P. H., and that said R. H. was authorized to give promissory notes for such goods, in the name of and in behalf of said P. H., that said P. H. was a man, and wanted to buy goods on credit of said G. B. B. and Company, in the fair and usual honest course of trade, with intent to pay honestly for them at the expiration of the term of credit upon which they should be sold.

And the said B., N., and L., then and there believing the said false pretences and representations, so made as aforesaid by the said R. H. and J. C., and being deceived thereby, were induced, by reason of the false pretences and representations so made as aforesaid, to deliver, and did then and there deliver, to the said R. H. and J. C. for said P. H., sundry goods and merchandise of great value, to wit, of the value of one hundred and forty-seven dollars and sixty-six cents, to wit, one piece of wool black cloth,

and intending by unlawful means to get into their hands and possession, etc. But the evidence fully sustained the allegation. By means of these false pretences, the defendants did actually obtain and get into their hands and possession these goods; and although they might have had a further purpose of eventually delivering them to P. Harley for her sole use, that fact, if shown by the defendants, would not avail them to escape from this indictment.

"The remaining exception was, that the false pretences were not, as shown by the evidence, made personally to either of the members of the firm of George B. Blake & Co., but to a clerk acting for them in their shop, and by him communicated to one of the firm. This objection was not much relied on, and it cannot be sustained. It was directly overruled in the case of *Com. v. Call* (21 Pick. 515), where it was held that a false representation to an agent who communicates it to his principal, who is influenced by it, is a false pretence to the principal."

one piece of ribbed cassimere cloth, one piece of mixed doeskin cloth, six pounds' weight of thread, and one pound of beaux-sewings, of the proper goods, merchandise, chattels, and effects of said B., N., and L.

And the said C. and R. H. did then and there receive and obtain the said goods, merchandise, chattels, and effects of the said B., N., and L., by means of the false pretences and representations aforesaid, and with the intent to cheat and defraud the said B., N., and L., of the same goods and merchandise, chattels, and effects.

Whereas, in truth and in fact, said P. H. was not possessed of, and was not the rightful owner of, said stock of goods in said store, at said corner of Hanover Street and Union Street, but, before that time, had made, executed, and delivered divers, to wit, five, mortgages on said stock and her property, conditioned for the payment of large sums of money, to wit, sums of money collectively amounting to more than the value of said stock of goods and her mortgaged property aforesaid; all of which mortgages are recorded in the city clerk's office of said city of Boston, according to law, one of which is dated on the fourteenth day of July, in the year eighteen hundred and forty-one, to R. H., administrator on the estate of one C. H.; another is dated on the tenth day of May, in the year eighteen hundred and forty-two, to the same administrator; and another is dated on the second day of June, in the same year, to the same administrator; and another of said mortgages is dated on the twenty-ninth day of September, in the same year, to the same administrator; and another of said mortgages is dated on the thirty-first day of October, in the same year, to the same administrator; and said P. H. was not a solvent person in good credit, but was poor, embarrassed, and unable to pay the debts P. H. owed, and the said P. H. was not a man but a woman, named P. H., who was insolvent and unable to pay her debts, and she did not want to buy goods honestly on credit in a fair way of business, and said C. and R. H. did not want for her to buy goods honestly in a fair course of trade on credit of said B., N., and L., with intent to pay for them as aforesaid, but to cheat them.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said R. H. and J. C., by means of the false pre-

tences aforesaid, on the said fourth day of November, in the year of our Lord eighteen hundred and forty-two, at Boston aforesaid, unlawfully, knowingly, and designedly did receive and obtain from said B., N., and L. the said goods, merchandise, chattels, and effects of the proper goods, merchandise, chattels, and effects of the said B., N., and L., with intent to defraud them of the same, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(549) *That defendant possessed a capital of eight thousand dollars, which had come to him through his wife, it being her estate, and that a part of it had already come into his possession, and a part would come into his possession in the month then next ensuing, etc.(h) First count.*

That J. A. B., late of the said county, trader, maliciously and wickedly devising and intending to cheat W. H. A. and E. R.

(h) This was the indictment in *Com. v. Burdick* (2 Barr, 163), with the exception of the introduction in the text of the "scienter" after the allegation of the falsity of the pretences. The statute in this case received an extremely liberal construction from Gibson, C. J.: "The rule of the common law," he said, "that cheating in private transactions without affecting the public, must, to be indictable, have been effected by artful devices or false tokens, was found to be too narrow for the business of the world, and the English statute, 20 Geo. II. c. 29, which has given place to the 7 Geo. IV. c. 92, s. 53, was enacted to extend the limits of the offence. From these, our act of 1842, § 21, seems to have been taken, and decisions on the clause in the first, which declares it an indictable offence to get money, chattels, or securities from another, 'by false pretence or pretences,' or in the second, 'by any false pretence,' may be advantageously applied to cases here. The distinctions taken under these statutes, between cases sometimes differing in almost imperceptible degrees, are nice and well founded; and though not authoritative here, may help us in attaining a sound construction of our own statute, which differs from either of its models very little in substance or in form. It would be a waste of time to pass those decisions in review, as they are collected and arranged in all the text books of criminal law; but it may be collected from them, that a professed intent to do an act which the party did not mean to do, as in *Rex v. Goodall* (R. & R. 461), and *Rex v. Douglass* (1 Mood. C. C. 462), is the only species of false pretence to gain property which is not indictable. These two cases, having been decided by the twelve judges, are eminently entitled to respect; but I think it at least doubtful whether a naked lie, by which credit has been gained, would not, in every case, be deemed within our statute, which declares it a cheat to obtain money or goods by any false pretence *whatsoever*. Its terms are certainly more emphatic than those of either of the English statutes; but whether a false pretence of mere intent be within them or not, it is certain that a fraudulent misrepresentation of the party's means and resources is within the English statutes, and, *a fortiori*, within our own. In *Rex v. Jackson* (3 Campb. 370), it was held to be an offence to obtain goods by giving a check on a banker with whom the drawer kept no cash. Of the same stamp is the *King v. Parker* (2 C. & P. 825); but *Regina v. Henderson* and another (1 C. & M. 183) is still more to the purpose. The prisoners falsely pretended that one

of their goods and merchandise, on, etc., at, etc., did falsely, unlawfully, knowingly, designedly, and fraudulently pretend to the said W. H. A. and the said E. R., that he the said J. A. B. possessed a capital of eight thousand dollars, that the said eight thousand dollars had come to him through his wife, it being her estate, and that a part of it had already come into his possession, a part would come into his possession in the month then next ensuing, and that for the remaining part thereof he would be obliged to wait for a short time; whereas, in truth and fact, he, the said J. A. B., did not then possess a capital of eight thousand dollars, nor had eight thousand dollars come to him through his wife, it being her estate, a part of which had already come into his possession, a part would come into his possession in the month then next ensuing, while for the remaining part thereof he would be obliged to wait for a short time, as he, the said J. A. B., did then and there falsely pretend to the said W. H. A. and the said E. R.; of the falsity of which said pretences he, the said J. A. B., then and there well knew. And the inquest, etc., do further present, that the said J. A. B., afterwards, to wit, on the day and year aforesaid, at the county and within the jurisdiction aforesaid, by the said false pretences aforesaid, did then and there unlawfully, fraudulently, and designedly obtain from the said W. H. A. and E. R. divers goods and merchandise, to wit, six pieces rich satin stripe silk, being together of the value of one hundred and four dollars, and one piece of striped cloaking, of the value of fifty dollars, being then and there the property of the said W. H. A. and E. R., with intent to defraud the said W. H. A. and E. R. of the same, to the great damage of the said W. H. A. and the said E. R., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

of them was possessed of twelve pounds, which he agreed to give for his confederate's horse, for which it was proposed that the prosecutor should exchange his mare; and this was held to be clearly a false pretence within the statute. Now the defendant is charged in the indictment before us, with having wilfully misrepresented that he had a capital of eight thousand dollars, in right of his wife; that a part of it was already received; that another part of it would be received in the course of a month; and that the residue would be received shortly afterwards; and if, as was said in Mitchell's case (2 East, P. C. 80), a false pretence is within the English statute, wherever it has been the efficient cause of obtaining credit, the false pretence before us is within our own." See in general Wh. Cr. L. 8th ed. §§ 1135, 1173.

(550) *Second count. That defendant has a capital of \$8000, which came through his wife.*

And the inquest, etc., do further present, that the said J. A. B., wickedly and fraudulently devising and intending as aforesaid to cheat and defraud the said W. H. A. and E. R. of their goods and merchandise, on the day and year aforesaid, at the county and within the jurisdiction aforesaid, did falsely, designedly, and fraudulently pretend to the said W. H. A. and E. R., that he the said J. A. B. possessed a capital of eight thousand dollars, which said eight thousand dollars had come to him through his wife, it being her estate; whereas, in truth and fact, he the said J. A. B. did not then and there possess a capital of eight thousand dollars, nor had eight thousand dollars come to him through his wife, nor had she, his wife, as aforesaid, an estate of eight thousand dollars, as he the said J. A. B. did then and there falsely pretend to the said W. H. A. and the said E. R., of the falsity of which said pretences, he the said J. A. B. then and there well knew. And the inquest, etc., do further present, that the said J. A. B., afterwards, to wit, on the day and year aforesaid, at the county and within the jurisdiction aforesaid, did, unlawfully, knowingly, and fraudulently obtain from the said W. H. A. and the said E. R. divers goods and merchandise, to wit, six pieces of rich satin stripe silk, together of the value of one hundred and four dollars, and one piece of striped cloaking, of the value of fifty dollars, being then and there the property of the said W. H. A. and E. R., with intent to defraud the said W. H. A. and E. R. of the same, to the great damage of the said W. H. A. and the said E. R., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(551) *Third count. That defendant had a capital of \$8000.*

That the said J. A. B., wickedly and fraudulently devising and intending as aforesaid to cheat and defraud the said W. H. A. and E. R. of their goods and merchandise, on the day and year aforesaid, at the county aforesaid, and within the jurisdiction aforesaid, did falsely, designedly, and fraudulently pretend to the said W. H. A. and the said E. R., that he the said J. A. B. then and there possessed a capital of eight thousand dollars; whereas,

in truth and in fact, the said J. A. B. did not then and there possess a capital of eight thousand dollars, as he the said J. A. B. then and there did falsely pretend to the said W. H. A. and the said E. R. And the inquest, etc., do further present, that the said J. A. B. did then and there unlawfully, knowingly, and fraudulently obtain from the said W. H. A. and the said E. R. divers goods and merchandise, to wit, six pieces of striped silk, being together of the value of one hundred and four dollars, and one piece of striped cloaking of the value of fifty dollars, being then and there the property of the said W. H. A. and the said E. R., with intent to defraud the said W. H. A. and the said E. R. of the same, to the great damage of the said W. H. A. and the said E. R., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(552) *Pretence that defendant was well off and free from debt, etc.*(i)

That A. G. D., etc., on, etc., at, etc., unlawfully and wickedly devising and intending to cheat and defraud one W. F. of his goods, moneys, chattels, and property, unlawfully, fraudulently, and designedly did falsely pretend to the said W. F., that he the said A. G. D. had paid every dollar of the old score that he owed in Philadelphia, that he was well off, and that he was very rich, and had a great deal of property in Kentucky. Whereas, in truth and in fact, he the said A. G. D. had not paid every dollar of the old score that he owed in Philadelphia, and was not well off, and was not very rich, but on the contrary was very poor, and did not own a great deal of property in Kentucky; and he the said A. G. D. then and there well knew the said pretence and pretences to be false; by color and means of which said false pretence and pretences, he the said A. G. D. did then and there unlawfully obtain from the said W. F. one black mantilla of the value of twenty-five dollars, one garnet mantilla of the value of twenty dollars, one black silk mantilla of the value of fourteen dollars, one black embroidered mantilla of the value of fourteen dollars, two plain silk mantillas of the

(i) *Com. v. Daniels*, 2 Parsons, 352. Under this indictment the defendant was convicted in Philadelphia, and sentenced. A writ of error was afterwards taken in the supreme court (the assignment of error being confined to the sentence), and the judgment of the court below was affirmed. *Wh. Cr. L.* 8th ed. §§ 1147, 1170.

value of twenty-four dollars, two figured silk mantillas of the value of eighteen dollars, twenty-six yards and a half of striped silk of the value of forty-three dollars and six cents, two silk shawls of the value of twenty-four dollars, two cashmere shawls of the value of twenty dollars, two net bags of the value of eight dollars, two velvet bags of the value of eight dollars, twelve yards of figured silk of the value of nineteen dollars and fifty cents, one trunk of the value of one dollar and fifty cents, being together of the value of two hundred and thirty-nine dollars and six cents, being then and there the property of the said W. F., with intent to cheat and defraud the said W. F., to the great damage of the said W. F., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(553) *Second count. Negating the pretence more fully.*

That the said A. G. D., etc., on, etc., at, etc., unlawfully and wickedly designing and intending to cheat and further defraud the said W. F. of his goods, moneys, chattels, and property, unlawfully and designedly did further falsely pretend to the said W. F., that he the said A. G. D. had paid every dollar of the old score that he owed in Philadelphia (meaning thereby that he paid and discharged all the old debts which he owed in Philadelphia, and all debts which he had previously contracted in Philadelphia), that he was well off (meaning thereby that he had ample means), that he was rich, and had a great deal of property in the state of Kentucky (meaning thereby that he was a person of great wealth). Whereas, in truth and in fact, he the said A. G. D. had not then and there paid off every dollar of the old debts which he owed in Philadelphia, and had not paid off all debts which he had previously contracted in Philadelphia, but on the contrary then and there owed and still does owe large sums of money to various persons, as follows: Seven hundred and fifty-eight dollars and seventy-eight cents to J. M. O., J. T., and S. B. D., trading as O. and T.; ten hundred and forty dollars and eighteen cents to S. W. A., G. W. J., and W. F., trading as A., J. and Co.; eight hundred and twenty-two dollars and twenty-two cents to R. L. and H. J., trading as L. and J.; three hundred and ninety dollars and twenty-four cents to I. H. and W. J. W., trading as H.

and W.; four hundred and forty-one dollars and thirty-four cents to R. D. W., J. A., J. B., and H. W., trading as W. and A.; three hundred and ninety-seven dollars and fifty-one cents to R. W. D. T., W. S. P., and C. B. T., trading as T., P., and T.; eighty-five dollars and twenty-six cents to R. J. T. and O. E., trading as T. and E.: and he the said A. G. D. was not well off, but on the contrary was very poor, and he the said A. G. D. was not rich, but on the contrary was then insolvent and unable to pay his debts, and he the said A. G. D. had not then a great deal of property in Kentucky; by color and means of which said false pretence and pretences, he the said A. G. D. did then and there unlawfully obtain from the said W. F. the goods and chattels, property, and merchandise in the aforesaid first count mentioned, with intent to cheat and defraud the said W. F., to the great damage of the said W. F., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(554) *That certain property of the defendant was unincumbered, and that he himself was free from debts and liabilities.*(j)

That before the commission of the offence hereinafter mentioned, one R. H. C. was possessed of and entitled to a certain reversionary interest, to wit, a certain reversionary interest of and in and to one third of a certain sum of ten thousand pounds, three per cent. annuities, expectant on the death of one R. C., and that the said R. H. C. before the commission of the offence hereinafter mentioned, to wit, on the first day of November, in the year of our Lord duly executed a certain mortgage of the said reversionary interest to one R. S. H. H., as and for and by the way of security to the said R. S. H. H., for the repayment to him of a certain sum of money, to wit, the sum of one thousand pounds and interest, and that the said R. H. C. afterwards, and before the commission of the said offence, to wit, on the twenty-fifth day of October, in the year of our Lord charged the said reversionary interest, to which he was so entitled as aforesaid, with the payment of a certain other sum of money, to wit, the sum of five hundred pounds and interest. And the jurors aforesaid, upon their oath aforesaid, do further present,

that the said R. H. C., late of the parish of Saint Pancras, in the county of Middlesex, gentleman, well knowing the premises, and contriving and intending to cheat and defraud, on the thirteenth day of March, in the year of our Lord at the parish aforesaid, and within the jurisdiction of the said court, did apply to and request one J. P. to advance and lend to him, the said R. H. C., a certain sum of money, to wit, the sum of two hundred pounds, and did then and there unlawfully and knowingly falsely pretend to the said J. P. that the said R. H. C. had not then incumbered his said reversionary interest, and that the said R. H. C. had not borrowed any money from any other person on the security of the said reversionary interest of the said R. H. C.; by means of which said false pretences the said R. H. C. did then and there unlawfully, knowingly, and designedly fraudulently obtain of and from the said J. P. one order for the payment of money, to wit, for the payment and of the value of two hundred pounds, and one piece of paper, of the value of one penny, and the sum of two hundred pounds in money, of the property, goods, chattels, and moneys of the said J. P., with intent then and there to cheat and defraud him of the same; whereas, in truth and in fact, the said R. H. C., at the time he so falsely pretended as aforesaid, had incumbered, and well knew that he had incumbered, his said reversionary interest; and whereas, in truth and in fact, the said R. H. C., at the time he so falsely pretended as aforesaid, had borrowed, and well knew that he had borrowed, certain money from certain persons, other than the said J. P., upon the security of the said reversionary interest, to wit, the said sum of one thousand pounds, of and from the said R. S. H. H., and the said other sum of five hundred pounds, of and from one J. J.; contrary to the form of the statute in such case made and provided, and against the peace, etc.

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. H. C., being possessed of and entitled to a reversionary interest in a certain sum of ten thousand pounds, three per cent. annuities, expectant upon the decease of one R. C., did apply to and request the said J. P. to advance and lend money to him the said R. H. C., to wit, on the thirty-first

day of May, in the year of our Lord at the parish aforesaid, and within the jurisdiction of the said court, and did then and there unlawfully, knowingly, and designedly falsely pretend to the said J. P. that the said R. H. C. had never in any manner theretofore mortgaged, assigned, or incumbered his reversionary interest in the said ten thousand pounds, three per cent. annuities, or any part thereof; that the said R. H. C. had never been a party to any deed or instrument whereby his interest in the said stock had or could have been in any manner affected; that the said R. H. C. was not then liable on any deed or instrument as surety for any person whomsoever; that the said R. H. C. had not then borrowed any money whatsoever, except from the said J. P., and that the said R. H. C. did not then owe, and was not then liable, for a greater amount of debts, exclusive of a sum of four hundred pounds, which he then owed to the said J. P., than the sum of three hundred pounds; by means of which said false pretences, in this count mentioned, the said R. H. C. did then and there unlawfully, knowingly, and designedly fraudulently obtain of and from the said J. P. one order for the payment of money, to wit, for the payment and of the value of the sum of fifty pounds, and one piece of paper of the value of one penny, and the sum of fifty pounds in money, of the property, goods, chattels, and moneys of the said J. P., with intent to cheat and defraud him of the same; whereas, in truth and in fact, at the time the said R. H. C. so falsely pretended as last aforesaid, he had mortgaged, assigned, and incumbered his said reversionary interest in the said sum of ten thousand pounds, three per cent. annuities, to wit, to the said R. S. H. H. and J. J., for the purpose of securing to them respectively the repayment of the said sums of one thousand pounds and five hundred pounds hereinbefore mentioned; and whereas, in truth and in fact, at the time the said R. H. C. so falsely pretended as last aforesaid, the said R. H. C. had been, and then was, a party to certain deeds, by which his said reversionary interest in the said sum of ten thousand pounds had been and was then affected, to wit, the said deeds by which the repayment of the said sums of one thousand pounds and five hundred pounds was charged upon his said reversionary interest; and whereas, in truth and in fact, at the time the said R. H. C. so falsely pretended as in this count aforesaid, the said R. H. C.

was liable on certain bonds as surety for certain persons, to wit, one M. S. and one E. J., to wit, in two several sums of fifteen thousand pounds; and whereas, in truth and in fact, at the time the said R. H. C. so falsely pretended as in this count mentioned, the said R. H. C. had borrowed certain sums of money from certain persons other than the said J. P., to wit, the sum of five thousand pounds from the said R. S. H. H., and the sum of three thousand pounds from the said J. J.; and whereas, in truth and in fact, at the time the said R. H. C. so falsely pretended as aforesaid, the said R. H. C. did owe, and was then liable for a greater amount of debts than the sum of three hundred pounds, exclusive of any money which he then owed to said J. P., that is to say, the said R. H. C. then owed to the said R. S. H. H. a greater sum of money than the sum of three hundred pounds, to wit, the sum of six hundred pounds, and the said R. H. C. then owed to the said J. J. a greater sum of money than the said sum of three hundred pounds, to wit, the sum of six hundred pounds, all which said several premises the said R. H. C., at the time he so falsely pretended as aforesaid, well knew; contrary to the form of the statute in such case made and provided, and against the peace, etc.

(554a) *False pretence that goods were unincumbered.*(k)

That W. M., on, etc., at, etc., unlawfully, designedly, and knowingly did falsely pretend unto T. M. W. that the goods of him, the said W. M. were unincumbered, and that a certain pretended bill of sale of the said goods, which pretended bill of sale the said W. M. then delivered to the said T. M. W., was a good and valid bill of sale of the said goods to the said T. M. W.; by means of which said false pretences the said W. M. did then and there unlawfully, designedly, and knowingly obtain from the said T. M. W. £8 17s. 6d. in money, with intent to defraud; whereas, in truth and fact, the said goods of him, the said W. M., were not unincumbered, nor was the said pretended bill of sale a good and valid bill of sale of the said goods to the said T. M. W., etc. (*Conclude as in book 1, chapter 3.*)

(k) Sustained in *R. v. Meakin*, 11 Cox, C. C. 270.

(555) *Pretence that defendant had then purchased certain property, which it was necessary he should immediately pay for.*(l)

That W. J., late of the parish of Christchurch, Newgate Street, in the city of London, laborer, on the first day of March, in the year of our Lord at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said court, did unlawfully, fraudulently, knowingly, and designedly falsely pretend to one S. N. that the said W. J. then had at a certain place, then called and known by the name of Dixon's Liars, to wit, at Dixon's Liars, at Islington, in the county of Middlesex, and within the jurisdiction of the said court, one hundred and eight sheep, which the said W. J. had then purchased, and for which said one hundred and eight sheep the said W. J. had then and there to pay on the said first day of March, to wit, on the day and year aforesaid, and within the jurisdiction aforesaid, by means of which said false pretences the said W. J. did then and there, and within the jurisdiction aforesaid, unlawfully, knowingly, and designedly fraudulently obtain of and from the said S. N., of the goods, chattels, moneys, and valuable securities of the said S. N., ten pieces of the current gold coin of this realm, called sovereigns; one valuable security, to wit, an order for the payment of, and of the value of one hundred pounds; one other valuable security, to wit, one order for the payment of, and of the value of five hundred pounds; one other valuable security, to wit, one other order for the payment of money, to wit, one other order for the payment of, and of the value of four hundred pounds; one other valuable security, to wit, one other order for the payment of money, to wit, one other order for the payment of, and of the value of three hundred pounds; and one other valuable security, to wit, one other order for the payment of money, to wit, one other order for the payment of, and of the value of six hundred pounds; with intent then and there, and within the jurisdiction aforesaid, to cheat and defraud the said S. N. of the same goods, chattels, moneys, valuable securities, and orders for the payment of money respectively, the said sums of money payable and secured by and upon the

(l) 4 Cox, C. C. Appendix, p. xxxiii.

said valuable securities and orders for the payment of money, being then and there due and unsatisfied to the said S. N., the proprietor and owner of the said several valuable securities and orders for the payment of money respectively ; whereas, in truth and in fact, the said W. J. had not, at the time when the said W. J. so obtained the said moneys, and the said several valuable securities and orders for the payment of money from the said S. N. as aforesaid, and when the said W. J. made the said false pretences as aforesaid, one hundred and eight sheep at Dixon's Liars, at Islington ; and whereas, in truth and in fact, the said W. J. had not then purchased the said one hundred and eight sheep ; and whereas, in truth and in fact, the said W. J. had not then to pay for the said one hundred and eight sheep, to wit, on the said first day of March ; all of which said false pretences the said W. J., at the time of the making thereof, well knew to be false ; to the great damage, injury, and deception of the said S. N. and in fraud of the said S. N., to the evil example of all others in the like case offending, contrary to the form of the statute in such case made and provided, and against the peace, etc.

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said S. N., heretofore, to wit, on the day and year aforesaid, and within the jurisdiction aforesaid, was accustomed to, and from time to time and at various times did, at the request of the said W. J., advance and intrust divers sums of moneys to the said W. J. for the purpose of, and to enable the said W. J. to pay for sheep, after the said W. J. had, in the way of his trade, purchased the same. And the jurors aforesaid, on their oath aforesaid, do further present, that the said W. J. heretofore, to wit, on the said first day of March, in the year aforesaid, in the city aforesaid, and within the jurisdiction of the said court, well knowing the premises, did unlawfully, fraudulently, knowingly, and designedly falsely pretend to the said S. N. that the said W. J. had theretofore, and before the making the false pretences by the said W. J. hereinafter in this count mentioned, purchased for himself a certain number of sheep, of a certain value, to wit, of the value of five hundred

pounds, for which the said W. J. had to pay at the bank of Messieurs Pockington and Company, on the day and year last aforesaid, a certain sum of money, to wit, the sum of five hundred pounds, by means of which last mentioned false pretences in this count mentioned, the said W. J. did then and there, and within the jurisdiction aforesaid, unlawfully, knowingly, and designedly fraudulently obtain, of and from the said S. N., of the goods and chattels, moneys, and valuable securities of the said S. N., one valuable security, to wit, one order for the payment of money, to wit, one order for the payment of, and of the value of five hundred pounds, with intent then and there, at the time of the making of the said false pretences by the said W. J. in this count mentioned, and within the jurisdiction of the said court, to cheat and defraud the said S. N. of the said valuable security and order for payment of money in this count mentioned, the said sums of money in this count payable, and secured by and upon the said valuable security and order for the payment of money in this count mentioned, being then and there, to wit, at the time of the making of the said last mentioned false pretences, due and unsatisfied to the said S. N., the proprietor and owner of the same; whereas, in truth and in fact, the said W. J. had not theretofore, and before the making of the said false pretences by the said W. J. in this count mentioned, purchased for himself a certain number of sheep, of the value of five hundred pounds, for which the said W. J. had to pay at the bank of Messieurs Pockington and Company, on the day and year last aforesaid, and in this count mentioned, the said sum of five hundred pounds, which said last mentioned false pretences the said W. J., at the time of the making thereof, well knew to be false; to the great damage, injury, and deception of the said S. N., and in fraud of the said S. N., to the evil example of all others in the like case offending; contrary to the statute in that case made and provided, and against the peace, etc.

(556) *Pretence that a certain draft for \$7700, drawn by a house in Charleston on a house in Boston, which the defendant exhibited to the prosecutor, had been protested for non-payment; that the defendant had had his pocket cut, and his pocket-book, containing \$195, stolen from it; that a draft drawn by a person in Philadelphia, which the defendant showed the prosecutor, had been received by the defendant in exchange for the protested draft, and that the defendant expected to receive the money on the last mentioned draft.*(m)

That E. H., late, etc., being a person of an evil disposition, ill-name and fame, and of dishonest conversation, and devising and intending by unlawful ways and means to obtain and get into his hands and possession the moneys, goods, chattels, and effects of the honest and good people of the state of New York, to maintain his idle and profligate course of life, on, etc., at, etc., with intent to cheat and defraud one A. B., did then and there unlawfully, knowingly, and designedly falsely pretend and represent to the said A. B., that a certain draft for seven thousand seven hundred dollars, purporting to have been drawn by a Mr. E. of Charleston on a house in Boston (and which the said E. H. then and there exhibited to the said A. B.), had been protested for non-payment; that he, the said E. H., had his pocket cut, and his pocket-book, containing one hundred and ninety-five dollars, stolen therefrom, and that he had got the pocket-book subsequently at the police office in the city of New York, but no money; that a certain other draft for six thousand five hundred dollars, drawn on a Mr. T. of Philadelphia (which said E. H. then and there exhibited to the said A. B.), had been received in exchange by him the said E. H. for the protested draft as aforesaid; and that the said E. H. expected to receive the money on the said last mentioned draft; and the said A. B.,

(m) *People v. Hale*, 1 Wheel. C. C. 174. This count purports to have been "settled" by Mr. Maxwell, the then district attorney of New York. The offence is set forth with sufficient particularity, with the exception of the last assignment of pretence, "that defendant *expected* to receive the money," etc., which had it stood alone would have been insufficient to have sustained a verdict. It does not appear from the report whether any exception was taken to the indictment, the chief point in the case, so far as the syllabus is concerned, being the declaration of Recorder Riker, that "the court was always willing to hear what could be alleged in favor of a prisoner, in arrest of judgment."

then and there believing the said false pretence and representation so made as aforesaid by the said E. H., and being deceived thereby, was induced by reason of the false pretence and representation, so made as aforesaid, to deliver, and did then and there deliver to the said E. H. thirty pieces of silver coin, called dollars, of the value of one dollar each; ten promissory notes for the payment of five dollars each, and of the value of five dollars each, then and there being due and unsatisfied; five other promissory notes for the payment of three dollars each, and of the value of three dollars each, then and there being due and unsatisfied, of the proper moneys, goods, chattels, and effects of the said A. B.; and the said E. H. did then and there receive and obtain the said promissory notes and money of the said A. B., of the proper moneys, goods, chattels, and effects of the said A. B., by means of the false pretence and representation aforesaid, and with intent to cheat and defraud the said A. B. of the said promissory notes and money; whereas, in truth and in fact, the said E. H. had not any draft for six thousand seven hundred dollars, drawn by Mr. E. of Charleston on a house in Boston, and no such draft had been protested; and whereas, in truth and in fact, the said E. H. had not been robbed of any money, and never did receive any pocket-book from the police office which had been stolen from him; and whereas, in truth and in fact, no other draft for six thousand five hundred dollars, drawn on a Mr. T. of Philadelphia, had ever been received by him, the said E. H., in exchange for the said first mentioned draft; and whereas, in truth and in fact, both drafts exhibited by the said E. H. as aforesaid to the said A. B. were forged and false, and the said E. H. never expected to receive any money by virtue thereof from the persons on whom they purported to be drawn, and which the said E. H. then and there well knew; and whereas, in fact and in truth, the pretence and representation so made as aforesaid by the said E. H. to the said A. B. was in all respects utterly false and untrue, to wit, on, etc.; and whereas, in fact and in truth, the said E. H. well knew the said pretence and representation, so made by him as aforesaid to the said A. B., to be utterly false and untrue at the time of making the same. And the jury aforesaid, etc., do further present, that the said E. H., by means of the false pretence aforesaid,

on, etc., at, etc., unlawfully, falsely, knowingly, and designedly did receive from the said A. B., of the proper moneys, goods, chattels, and effects of the said A. B., with intention to defraud him of the same, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(556a) *False pretence of possessing halves of certain bank notes.*

That M. M., etc., at, etc., did heretofore, to wit, on, etc., send through the post to one J. O., residing, etc., a written order and request note for the delivery to her, the said M. M., of certain quantities of tea and sugars of the goods and chattels of the said J. O., and together with said written order and request note the said M. M. then sent certain, to wit, two halves of bank notes by way of payment for a sum of £2 for the goods aforesaid. And the jurors aforesaid, upon their oath, do further say and present, that the said M. M., on the day in the year aforesaid, unlawfully and knowingly did falsely pretend to the said J. O. that she then had in her custody and procurement for the satisfaction of the said J. O. certain halves of bank notes, being the proper and corresponding halves of the bank notes so as aforesaid sent by the said M. M. to J. O., and that the same would in due course be sent by M. M. to J. O., by which said false pretences the said M. M. then unlawfully did obtain from the said J. O. certain, to wit, ten pounds weight of tea and fifty-six pounds weight of sugar of the goods and chattels of the said J. O., with intent to defraud; whereas, in truth and in fact, the said M. M. had not then in her custody or procurement, for the satisfaction of the said J. O., the said halves of bank notes, being the proper and corresponding halves of the halves of bank notes so as aforesaid sent by M. M. to J. O., as she did then so falsely pretend to J. O., and M. M. then well knew the said pretences to be false, against, etc.⁽ⁿ⁾ (*Conclude as in book 1, chapter 3.*)

⁽ⁿ⁾ In two other counts the traverser was similarly indicted for sending half notes to J. B. and H. M. respectively. In each count, by direction of the court, the words "or procurement" were struck out. Evidence was given by J. B., H. M., and several other persons to the effect that the prisoner had written letters to the witnesses, inclosing half notes, and requesting that goods might be forwarded to her. The goods were sent, but the traverser would not send the second half notes. Several of the witnesses held the corresponding halves of the notes sent to the others. The police constables who arrested the prisoner found

(557) *Pretence that a certain watch sold by defendant to prosecutor was gold.*(o)

That A. B., etc., contriving and intending one C. D., by false pretence to cheat and defraud of his money and property [and by means of divers false pretences to be hereinafter more particularly described, to sell and dispose of as a genuine gold watch, to the said C. D., a certain watch of base and spurious metal], unlawfully, knowingly, and designedly did falsely pretend to said C. D., that the said watch which he the said A. B. then and there had was a gold watch [and that he the said A. B. did thereupon effect a sale of the said watch to the said C. D. for

several half notes with her. At the conclusion of the case for the crown counsel for the prisoner submitted that the indictment could not be maintained, as the pretence must be of an existing fact, and here the goods had been obtained upon a promise to send the other halves. Counsel for the crown said that there was evidence to sustain the count laid that she had the corresponding halves in her custody. The case was left to the jury, who found the traverser guilty. The learned judge (Lawson, J.) then stated a case for the court, the question being, "if the court should be of opinion that the evidence sustained that count of the indictment which alleged a pretence that she had the half notes in her custody, the conviction to be affirmed; if not, the conviction to be quashed." The conviction was affirmed by the Irish court for crown cases reserved. *R. v. Murphy*, 13 Cox, C. C. 298 (1876).

(o) This indictment is based generally on that in *Com. v. Strain*, 10 Met. 521, the allegations in brackets being introduced. "The case at bar," said the court, "if confined in its proof, on the trial by the jury, to the mere allegations in the indictment, would be certainly quite bald. The indictment does not allege any bargain, nor any colloquium as to a bargain for a watch; nor any proposition of Blake to buy, or of the defendant to sell a watch; nor any delivery of the watch, as to which the false pretences were made, into the possession of Blake, as a consideration for the money he paid the defendant.

"It seems to us, that where money or other property is obtained by a sale or exchange of property, effected by means of false pretences, such sale or exchange ought to be set forth in the indictment; and that the false pretences should be alleged to have been made with a view to effect such sale or exchange, and that by reason thereof the party was induced to buy or exchange, as the case may be.

"Although the language of the Rev. Sts. ch. 126, § 32, is very broad, yet all will agree that, in its practical application, the false declaration must be made to a party who has an interest in the matter, and is affected injuriously by the falsehood. We go further, however, and hold that in a case like the present, where the alleged false pretences were injurious only by inducing another person to buy the article as to which such false representations were made, such sale or offer for sale must be set out as part of the facts relied upon, and as a material allegation in the description of the offence.

"Upon the whole matter, the court are of opinion that this indictment does not plainly and distinctly set forth the offence intended to be charged; that it does not contain an averment of those material facts which the government would be bound to prove, before they could ask for a conviction; and that, for this cause, the judgment should be arrested."

the sum of, etc., of the money and property of the said C. D., he the said C. D. being induced to purchase said watch by the false pretence above mentioned], by means whereof, said A. B. then and there unlawfully, knowingly, and designedly did obtain from said C. D. the said (*setting forth the money obtained*), of the money and property of him the said C. D. as aforesaid, with intent him the said C. D. then and there to cheat and defraud of the same; whereas, in truth and in fact, said watch was not then and there a gold watch, but was a watch of base and spurious metal; and said A. B. then and there well knew that the same was not a gold watch, but was a watch of base and spurious metal as aforesaid; to the great damage and deception of him the said C. D., against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(557a) *Pretence that a chain was of gold.(p)*

The jurors for, etc., upon their oath present, that J. A., on, etc., unlawfully, knowingly, and designedly did falsely pretend to one T. W., that a certain Albert chain which he the said J. A. then asked the said T. W. to buy from him the said J. A., was of fifteen-carat gold, and that he the said J. A. was then a draper, and that the said chain had been made expressly for him the said J. A.; by means of which false pretences the said J. A. did then unlawfully obtain from the said T. W. a certain sum of money, to wit, £5, and a certain other Albert chain of the value of 7s. 6d., with intent to defraud; whereas, in truth and in fact, the said Albert chain which he the said J. A. then asked the said T. W. to buy from him the said J. A., as aforesaid, was not of fifteen-carat gold; and whereas, in truth and in fact, he the said J. A. was not then a draper; and whereas, in truth and in fact, the said chain had not been made expressly for him the said J. A., as he the said J. A. well knew at the time when he did so falsely pretend as aforesaid; against, etc. (*Conclude as in book 1, chapter 3.*)

(p) Sustained, *R. v. Ardley*, 12 Cox, C. C. 23; L. R. 1 C. C. 301; Wh. Cr. L. 8th ed. § 1157.

(558) *Obtaining money by means of a false warranty of the weight of goods.(q)*

That A. B., late of B., in the county of S., trader, on the first day of June in the year of our Lord at B. aforesaid, in the county aforesaid, unlawfully, knowingly, and designedly did falsely pretend to C. D. that a certain quantity of coals, which the said A. B. then and there delivered to the said C. D., weighed one ton and ten hundred weight, and that the said coals were then and there worth the sum of fifteen dollars; by means of which said false pretences the said A. B. did then and there unlawfully, knowingly, and designedly obtain from the said C. D. the sum of fifteen dollars, of the money of the said C. D., with intent then and there to cheat and defraud the said C. D. of the same. Whereas, in truth and in fact, the said coals did not weigh one ton and ten hundred weight; and whereas, in truth and in fact, the said coals were not worth the sum of fifteen dollars; and whereas, in truth and in fact, the said coals weighed only one ton and five hundred weight, and were not worth more than twelve dollars, as the said A. B. then and there well knew; contrary to the form of the statute in such case made and provided.

(559) *Obtaining money by a false warranty of goods.(r)*

That A. B., late of B. in the county of S., trader, on the first day of June, in the year of our Lord at B. aforesaid in the county aforesaid, unlawfully, knowingly, and designedly did falsely pretend to C. D., that a watch then and there produced by the said A. B., and offered for sale to the said C. D., was a silver watch, and was then and there of the value of fifty dollars; by means of which said false pretences the said A. B. did then and there unlawfully, knowingly, and designedly obtain from the said C. D. the sum of fifty dollars, of the money of the said C. D., with intent then and there to cheat and defraud the said

(q) "Although it was formerly supposed that such a case as this was not a false pretence within the statute, it is quite clear that it is; and there never was, in fact, any express decision to the contrary; the supposed case of *R. v. Read* (7 C. & P. 848), on which such a notion was founded, never having been considered by the judges." Lord Denman, C. J., in *R. v. Hamilton*, 9 Ad. & El. N. S. 271; 2 Cox, C. C. 11. See Wh. Cr. L. 8th ed. §§ 1161, etc.

(r) *R. v. Ball*, C. & M. 249. But see note to 557, *supra*.

C. D. of the same. Whereas, in truth and in fact, the said watch was not a silver watch, nor was the same then and there of the value of fifty dollars, as the said A. B. then and there well knew ; contrary to the form of the statute in such case made and provided, etc.

(559a) *Pretence that a certain brick-field was good and profitable.*

That E., etc., on, etc., at, etc., entered into negotiation with B. for the letting by the said E. and the hiring by the said B. of a certain field belonging to E., and referred to as "the ten acre field;" and that E., etc., intending to cheat and defraud, etc., on, etc., did unlawfully, knowingly, and designedly, falsely pretend to the said B., that the said field then was a good and profitable brick-field, that the said E. had made a profit of £400 upon a certain clump of bricks then standing in the said field, and which had all been made from the earth of the said field mixed with marsh mud; that one B., who was then upon the said field, was then willing and desirous to hire the said field from him the said E.; that the earth of the said field, when mixed with marsh mud, was then capable of yielding bricks as good as those in the said clump, and that he, the said E., had then recently been carrying on a profitable business by the manufacture of bricks from the earth of the said field mixed with marsh mud. By means of which said false pretences the said E. did then and there, with intent to defraud, unlawfully, knowingly, and fraudulently obtain of and from the said B., a certain valuable security, to wit, an agreement signed by the said B., in the words and figures following, that is to say (*setting out an agreement by E. to give a lease of the brick-field, and by B., to accept the same with all usual covenants for brick-field, machinery, and plant*), the machinery and plant at the yearly rent of £100, and £5 per acre surface rent, and 1s. 3d. per thousand for all bricks moulded, four millions to be made each year or paid for, and as many more at 1s. 3d. per thousand as B. chooses; the rent to be paid quarterly, commencing on, etc., B. taking possession at once; the term to be seven years. Whereas, in truth and in fact, the said field was not then a good or profitable brick-field; and whereas, in truth and fact, the said E. had not made a profit of £400, as he so falsely pretended as aforesaid,

upon the said clump of bricks then standing and being in the said field; and whereas, the said bricks in the said clump of bricks standing in the said field had not been all made from the earth of the said field mixed with marsh mud; and whereas, the said B., who was upon the said field when the said E. so falsely pretended as aforesaid, was not then willing or desirous to hire the said field from him the said E.; and whereas the earth of the said field, when mixed with marsh mud, was not then, as the said E. knew, capable of yielding bricks as good as those in said clump; and whereas, the said E. had not then recently been carrying on a profitable business by the manufacture of bricks from the earth of the said field, mixed with marsh mud, as he so falsely pretended as aforesaid.^(s) (*Conclude as in book 1, chapter 3.*)

(560) *Falsely pretending that goods were of a particular quality.*^(t)

The jurors, etc., upon their oath present, that A. B., late of B., in the county of S., trader, at the time of the making of the false pretences by him hereinafter mentioned, had in his possession and offered for sale divers pounds weight of cheese of little value and of inferior quality; and also had in his possession divers pieces of cheese called "tasters," of good flavor, taste, and quality. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B., being so thereof possessed, on the first day of June, in the year of our Lord at B. aforesaid, in the county aforesaid, unlawfully, knowingly, and designedly did falsely pretend to one C. D., that the said pieces of cheese called "tasters," which the said A. B. then and there delivered to the said C. D., were part of the cheese which the said A. B. then and there offered for sale, and that the said last mentioned cheese was of good and excellent quality, flavor, and taste, and that every pound weight of the said cheese so offered for sale by the said A. B. was of the value of twelve cents; by means of which said false pretences the said A. B. did then and there unlawfully, knowingly, and designedly obtain from the said C. D. certain money, to wit, the sum of twenty dollars, of the moneys of the said C. D., with intent then and there to cheat

^(s) R. v. English, 12 Cox, C. C. 171.

^(t) See R. v. Abbott, 1 Den. C. C. 273; 2 Cox, C. C. 430; 2 C. & K. 630.

and defraud the said C. D. of the same. Whereas, in truth and in fact, the said pieces of cheese called "tasters," which the said A. B. delivered to the said C. D., were not part of the cheese which the said A. B. offered for sale; and whereas, in truth and in fact, the said cheese offered for sale was not of good and excellent quality, flavor, and taste; and whereas, in truth and in fact, every pound weight of the said cheese offered for sale by the said A. B. was not of the value of twelve cents, as the said A. B. then and there well knew; contrary to the form of the statute in such case made and provided.

[*For an indictment for falsely averring ownership of personal property, and thereby obtaining money on mortgage for same, see Com. v. Lincoln, 11 Allen, 233.*]

(561) *Pretence that a certain horse to be sold, etc., was sound, and was the horse called "Charley."*(u)

That the said M., on, etc., contriving and intending knowingly and designedly by false pretences to cheat and defraud one J. L. of his moneys, goods, wares, and merchandise, and other things, did, knowingly and designedly, pretend to said L., that a certain horse which he the said M. then wished and offered to exchange with said L. for a certain colt and five dollars in money, was then and there a sound horse, and was the horse called the C., the said horse called the C. being well known to said L. by true and correct representations which he had received, although he had not seen said horse called the C., etc., by which false pretences said M. then and there induced the said L. to exchange with and deliver to said M. his said colt and five dollars in

(u) This is the substance of an indictment sustained in Maine, in *State v. Mills*, 17 Me. 24. "The horse, called the *Charley*," said the court, "might have had the reputation of possessing qualities, which rendered it desirable for the party injured to become the owner of him. The defendant produced a horse, which he affirmed was the *Charley*. It was a false pretence, fraudulently made, for the purpose of procuring a colt and money from another. The attempt succeeded. These facts the jury have found. It is a case literally within the statute; and we do not perceive why it is not within the mischief it was intended to punish. To sustain it would not be going further than precedents warrant. If the construction should be narrowed to cases, which might be guarded against by common prudence, the weak and imbecile, the usual victims of these pretences, would be left unprotected. It may not be easy to lay down any general rule, with proper qualifications and limitations; but in the case before us, we are of opinion that the offence charged has been committed." See Wh. Cr. L. 8th ed. §§ 928, 1130, 1155, 1176, 1218.

money, for said horse falsely represented as aforesaid to be the C., etc., and whereas, in truth and in fact, the said horse which said M. offered to and exchanged with said L., and which he represented as a sound horse, and as the horse called the C., was not a sound horse, and was not the horse called the C., but was a different horse, and unsound, and wholly worthless, etc.

(562) *Pretence that a horse and phaeton were the property of a lady then shortly before deceased, and that the horse was kind, etc.(v)*

That T. K. the elder, etc., and S. K., etc., intending, etc., on, etc., at, etc., unlawfully, knowingly, and designedly did falsely pretend to the said G. W. F., that a certain carriage, to wit, a carriage called a phaeton, and a certain mare and a certain gelding, which they the said defendants then and there offered for sale to the said G. W. F., had then been the property of a lady then deceased, and were then the property of her sister, and were not then the property of any horse-dealer, and were then the property of a private person, and that the said mare and the said gelding were then respectively quiet to ride and drive, and quiet and tractable in every respect. By means of which said false pretences the said defendants did then and there unlawfully, knowingly, and designedly obtain from the said G. W. F. a certain valuable security, to wit, an order for the payment of one hundred and sixty-eight pounds (being then and there the property of the said G. W. F.), with intent then and there to cheat and defraud him, the said G. W. F., of the same. Whereas, in truth and in fact, the said carriage, the said mare, and the said gelding had not then been the property of a lady then deceased, and were not then the property of her sister; and whereas, in truth and in fact, the said carriage, the said mare, and the said gelding were the property of a horse-dealer; and whereas, in truth and in fact, the said carriage, the said mare, and the said gelding were not then the property of a private person; and whereas, in truth and in fact, the said mare and the said gelding were not then quiet to ride and drive, and were not then quiet and tractable in every respect; and whereas the said defendants then and there well knew that the said carriage, the said mare,

(v) R. v. Kenrick, 5 Q. B. 49, where this count appears to be sustained. See Wh. Cr. L. 8th ed. §§ 1161, 1180, 1198.

and the said gelding had not then been the property of a lady then deceased, and were not then the property of her sister; and also then and there well knew that the same were then the property of a horse-dealer, and that the same were not then the property of a private person, and that the said mare and the said gelding were not then quiet to ride and drive, and were not then quiet and tractable in every respect; to the great damage and deception of the said G. W. F., to the evil example, etc., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(513) *Second count. Like the first, except that the offering for sale was alleged to have been by T. K. the elder, only.*

(564) *Other pretence as to the value and history of a horse, which the prisoners sold to the prosecutor.(w)*

The jurors, etc., upon their oath present, that heretofore, to wit, at the time of the commission of the offence hereinafter in this count mentioned, one R. J. T. was desirous of purchasing and providing himself with a horse which should be sound and quiet in harness; and that J. P. B., late of the parish of St. James, Westminster, in the county of Middlesex, and within the jurisdiction of the said court, laborer, and J. P., late of the same place, laborer, well knowing the premises, and that the said R. J. T. would be ready to purchase of and from any respectable and responsible person such horse as aforesaid; and that the said J. P. B. and J. P., having in their possession a certain horse, much under the value of three hundred pounds, to wit, of the value of one hundred pounds, and no more, and then being unsound; and the said J. P. B. and J. P., wickedly and fraudulently intending to persuade the said R. J. T. to deposit with them, the said J. P. B. and J. P., a large sum of money upon the delivery of the said horse to the said R. J. T. for trial and approval thereof, and under color of their readiness and willingness to return the said money, subject to the deduction of fifty pounds, in case the said horse should not be approved of by the said R. J. T., to cheat and defraud the said R. J. T. of the same money so to be deposited as aforesaid, on the seventh day of

September, in the year of our Lord at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did produce the said horse to the said R. J. T., and did then and there unlawfully, knowingly, and designedly falsely pretend to the said R. J. T., that the said J. P. B. then was in the wool business in the city of London; that the said horse then belonged to a brother of the said J. P. B. then abroad; that the said J. P. B. then had to sell the said horse for his said brother; that the said horse was then perfectly sound and quiet in harness, and had then been used to run with another horse in harness, which had been sold to a colonel. By means of which said false pretences the said J. P. B. and J. P. did then and there unlawfully, knowingly, and designedly fraudulently obtain of and from the said R. J. T. one piece of paper of the value of one penny, of the goods and chattels of the said R. J. T., and one order for the payment of money, to wit, for the payment of the sum of three hundred pounds, and of the value of three hundred pounds, then being the property of the said R. J. T., with intent then and there to cheat and defraud him of the said goods, chattels, and order respectively, the said sum of money payable and secured by and upon the said order being then due and unsatisfied to the said R. J. T., the proprietor of the said order; whereas, in truth and in fact, the said J. P. B. was not then in the wool trade in the city of London; and whereas, in truth and in fact, the said horse did not belong to a brother of the said J. P. B., who was abroad; and whereas, in truth and in fact, the said J. P. B. had not then to sell the said horse for his said supposed brother; and whereas, in truth and in fact, the said horse was not then sound or quiet in harness, and had not then been used to run with another horse which had been sold to a colonel; all of which said false pretences the said J. P. B. and J. P., at the time of making thereof as aforesaid, well knew to be false; to the great damage and deception of the said R. J. T., contrary to the form of the statute in such case made and provided, and against the peace, etc.

(565) *Pretence that one J. P., of the city of Washington, wanted to buy some brandy, etc.; that said J. P. kept a large hotel at Washington, etc., that defendant was sent by said J. P. to purchase brandy as aforesaid, and that defendant would pay cash therefor, if prosecutor would sell him the same.*(x) *First count.*

That A. S., late, etc., being an evil disposed person, with intent to and contriving and intending unlawfully, fraudulently, and deceitfully to cheat and defraud J. L. and P. J., copartners in trade, under the firm of J. L. and Company, of the said city and county, of their goods, wares, and merchandises, on, etc., at, etc., unlawfully, knowingly, and designedly did falsely pretend to the said J. L. and P. J., as aforesaid, that one J. P., of the city of Washington, wanted to buy some brandy, to wit, two half pipes of brandy, that the said J. kept a large hotel at Washington City aforesaid, that he the said A. S. was sent by the said J. P. to purchase brandy as aforesaid for him (said J. P. meaning), and he the said A. S. would pay therefor in cash, if they the said J. L. and P. J. would sell him the same; by which said false pretences the said A. S. did then and there, to wit, on, etc., at, etc., unlawfully, knowingly, and designedly obtain from the said J. L. and P. J., as aforesaid, two half pipes of brandy, of the value of three hundred dollars, of the goods, wares, and merchandises of the said J. L. and P. J., with intent then and there to cheat and defraud them the said J. L. and P. J. of the same; whereas, in truth and in fact, the said A. S. was not then sent by J. P. to purchase such brandy as aforesaid for him or any other person, and the said J. P. did not want to buy any brandy as aforesaid, and did not keep a hotel at Washington City as aforesaid, and the said A. S. did not, at the time of procuring the said brandy so as aforesaid, intend to pay for the same (*insert scienter*), to the great damage and deception of the said J. L. and P. J., to the

(x) *Com. v. Spring, Oy. & Term. City and County of Philadelphia.* See 3 Penn. L. J. 89. The defendant was convicted and sentence passed. The averment that he intended to pay, in the first two counts, would not have been alone sufficient, but as it was connected with other operative pretences, and as it could be disengaged from the context as surplusage, it did not vitiate the counts in which it was introduced. The omission of an averment, that the defendant knew the pretences to be at the time false, is more questionable.

evil example of all others in like cases offending, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

- (566) *Second count. That defendant was requested by one J. P., who kept a large hotel in Washington City, to purchase some brandy for said J. P., and that if prosecutor would sell defendant two half pipes of brandy, defendant would pay prosecutor cash for the same shortly after delivery.*

That the said A. S., being such person as aforesaid, with intent to and contriving and intending unlawfully, fraudulently, and deceitfully to cheat and defraud the said J. L. and P. J., copartners as aforesaid, of their goods, wares, and merchandises, on, etc., at, etc., unlawfully, knowingly, and designedly did falsely pretend to the said J. L. and P. J., as aforesaid, that he, the said A. S., was requested by one J. P., who kept a large hotel in Washington City, to purchase some brandy for him, said P.; and that if they, the said J. L. and P. J., would sell him, said A. S., two half pipes of brandy, he the said A. S. would pay for the same in cash shortly after delivery thereof; by which said false pretences the said A. S. did then and there, to wit, on the day and year last aforementioned, within the jurisdiction of the said court, unlawfully, knowingly, and designedly obtain from the said J. L. and P. J., as aforesaid, two half pipes of brandy, of value of three hundred dollars, of the goods, wares, and merchandises of the said J. L. and P. J., with intent then and there to cheat and defraud them, the said J. L. and P. J., of the same; whereas, in truth and in fact, the said A. S. was not requested by J. P. to purchase brandy for him, said P., and said P. did not keep a hotel in Washington City, and the said A. S. did not, at the time of procuring the said brandy as aforesaid, intend to pay for the same as aforesaid (*insert scienter*); to the great damage and deception of the said J. L. and P. J., to the evil example of all others in like case offending, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

- (567) *Third count. That defendant had been requested by one J. P. to purchase for him some brandy, that he (the said J. P.) kept a large hotel in Washington, etc.*

That the said A. S., being such person as aforesaid, with in-

tent to and contriving and intending unlawfully, fraudulently, and deceitfully to cheat and defraud the said J. L. and P. J., copartners as aforesaid, of their goods, wares, and merchandises, on the thirteenth day of July, in the year of our Lord one thousand eight hundred and forty-two, with force and arms, at the city and county aforesaid, and within the jurisdiction of the said court, unlawfully, knowingly, and designedly did falsely pretend to the said J. L. and P. J., as aforesaid, that he (the said A. S.) was requested by one J. P. to purchase for him some brandy, and that he (the said P.) kept a large hotel at Washington; by which said false pretences the said A. S. did then and there, to wit, on the day and year last aforementioned, at the city and county aforesaid, and within the jurisdiction of the said court, unlawfully, knowingly, and designedly obtain from the said J. L. and P. J., as aforesaid, two half pipes of brandy, of the value of three hundred dollars, of the goods, wares, and merchandises of the said J. L. and P. J., with intent then and there to cheat and defraud them, the said J. L. and P. J., of the same; whereas, in truth and in fact, the said A. S. was not requested by the said J. P. to purchase any brandy for him, and the said P. did not keep a hotel at Washington (*insert scienter*), to the great damage and deception of the said J. L. and P. J., to the evil example of all others in like cases offending, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(567a) *Pretence that defendant was a large dealer in potatoes.*

The jurors for, etc., upon their oath present, that W. C., on, etc., at, etc., unlawfully, knowingly, and designedly did falsely pretend to one J. G. that he, the said W. C., then was a dealer in potatoes, and as such dealer in potatoes then was in a large way of business, and that he, the said W. C., then was in position to do a good trade in potatoes, and that he, the said W. C., then was able to pay for large quantities of potatoes, as and when the same might be delivered to him, by means of which said false pretences the said W. C. did then unlawfully obtain from the said J. G. eight tons, fifteen hundredweights, and two quarters of potatoes, of the goods and chattels of the said J. G., with intent thereby then to defraud; whereas, in truth and in fact, the said W. C. was not then a dealer in potatoes, and was

not then as such dealer in potatoes in a large way of business, and whereas, in truth and in fact, the said W. C. was not then in a position to do a good trade in potatoes, and whereas, in truth and in fact, the said W. C. was not then able to pay for large quantities of potatoes as and when the same should be delivered to him, as he, the said W. C., well knew at the time when he did so falsely pretend as aforesaid; to the great damage and deception of the said J. G., to the evil example of all others in the like case offending, against, etc. (*Conclude as in book 1, chapter 3.*)

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Second count.

And the jurors aforesaid, upon their oath aforesaid, further present, that the said W. C. afterwards, to wit, on, etc., at, etc., did incur a certain debt and liability to one J. G., to wit, a debt and liability to the amount of £32 16s. 8d., as and for the price of certain potatoes supplied to him, the said W. C., by the said J. G. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. C., in incurring the said debt and liability, unlawfully, knowingly, and designedly did obtain credit from the said J. G. under false pretences, to wit, by falsely pretending to the said J. G. that he, the said W. C., then was a dealer in potatoes, and as such dealer in potatoes then was in a large way of business, and that he, the said W. C., then was in a position to do a good trade in potatoes, and that he, the said W. C., then was able to pay for large quantities of potatoes as and when the same might be delivered to him, whereas, in truth and in fact, the said W. C. was not then a dealer in potatoes, and was not then as such dealer in potatoes in a large way of business, and whereas, in truth and in fact, the said W. C. was not then in a position to do a good trade in potatoes, and whereas, in truth and in fact, the said W. C. was not then able to pay for large quantities of potatoes as and when the same should be delivered to him, as he, the said W. C., well knew at the time when he did so falsely pretend as aforesaid; to the great damage and deception of the said J. G., to the evil example of, etc.(y) (*Conclude as in book 1, chapter 3.*)

(y) R. v. Cooper, 13 Cox, C. C. 617.

(568) *Pretence that one of the defendants, having advanced money to the other on a deposit of certain title deeds, had himself deposited the deeds with a friend, and that he required a sum of money to redeem them; with counts for conspiracy.*(z)

That heretofore, and before and at the time of the committing of the offence hereinafter mentioned, one C. R., acting in fraudulent collusion with one J. A., had retained and employed one W. J., then and still practising as an attorney at law and solicitor in chancery, as the attorney and solicitor of the said C. R. to make application to the said J. A. for a certain debt of five hundred pounds, then alleged by the said C. R. to be due to him from the said J. A. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. A. afterwards, and before the committing of the offence hereinafter mentioned, acting in fraudulent collusion with the said C. R., offered to and arranged with the said W. J., as such attorney and solicitor of the said C. R., as aforesaid, to discharge such alleged debt of five hundred pounds, and also the further sum of fifty pounds, for a certain other alleged debt upon the deeds hereinafter mentioned being delivered to the said J. A., which said deeds the said C. R., acting in fraudulent collusion with the said J. A., afterwards, and before the committing of the offence hereinafter mentioned, proposed to place in the hands of the said W. J., as the attorney and solicitor of the said C. R., for the purpose of being so delivered to the said J. A. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said C. R., late of the parish of Saint George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said central criminal court, laborer, and the said J. A., late of the same place, laborer, devising and contriving, and wickedly combining and intending to deceive the said W. J. in the premises, and to obtain from the said W. J. the said sum of five hundred pounds, and to cheat and defraud him of the same, afterwards, to wit, on the first day of July, in the year of our Lord at the parish of Saint George, Bloomsbury, aforesaid, in the county aforesaid, and within the jurisdiction of the said central criminal court, unlawfully, knowingly,

(z) 4 Cox, C. C. Appendix, p. xli.

and designedly did falsely pretend to the said W. J., that the said J. A. was then really and truly indebted to the said C. R. in the said sum of five hundred pounds, for money lent by the said C. R. to the said J. A.; that the said J. A. had then deposited with the said C. R. certain deeds relating to the property of the wife of the said J. A., for the purpose of securing payment of the said sum of five hundred pounds to the said C. R., but that the said C. R. afterwards had deposited such deeds with a friend of the said C. R., who had then advanced money upon the security of the same deeds to the said C. R., and then held the said deeds as such security as last aforesaid; that the said C. R. then wanted the said sum of five hundred pounds from the said W. J., for the purpose of recovering possession of the said deeds, and to enable the said C. R. to place the same in the hands of the said W. J., in order that the same might be redelivered to the said J. A. upon the payment by him to the said W. J. of the said sum of five hundred pounds, pursuant to such offer and arrangement in that behalf as aforesaid; by means of which said several false pretences, they the said C. R. and J. A. then and there, to wit, on the day and year aforesaid, and within the jurisdiction of the said central criminal court, unlawfully, knowingly, and designedly did fraudulently obtain of and from the said W. J. one order for the payment of money, to wit, for the payment, and of the value of five hundred pounds, then and there being the property of the said W. J., and one piece of paper of the value of one penny, of the goods and chattels of the said W. J., with intent then and there to cheat and defraud him of the same property, goods, and chattels; and whereas, in truth and in fact, the said J. A. was not then really and truly indebted to the said C. R. in the said sum of five hundred pounds, as the said C. R. and J. A. so falsely pretended as aforesaid, either for money lent or any cause whatsoever. And whereas, in truth and in fact, the said J. A. had not then deposited with the said C. R. certain deeds relating to the property of the wife of the said J. A., for the purpose of securing payment of the said sum of five hundred pounds to the said C. R., as the said C. R. and J. A. so falsely pretended as aforesaid, or of any sum of money whatever. And whereas, in truth and in fact, the said C. R. had not then deposited any such deeds as the said C. R. and J. A. so falsely pre-

tended as aforesaid, with any friend of the said C. R., who had then advanced money upon the security of such deeds to the said C. R., or with any person whatsoever; nor did any such friend of the said C. R., as the said C. R. and J. A. so falsely pretended as aforesaid, then hold such deed as a security for any money advanced to the said C. R., as the said C. R. and J. A. so falsely pretended as aforesaid. And whereas, in truth and in fact, the said C. R. did not then want the said sum of five hundred pounds from the said W. J. for the purpose of recovering possession of any such deeds as the said C. R. and J. A. so falsely pretended as aforesaid, or to enable the said C. R. to place such deeds in the hands of the said W. J. in order that the same might be re-delivered to the said J. A. upon the payment by him to the said W. J. of the said sum of five hundred pounds, pursuant to such offer and arrangement in that behalf as aforesaid. And whereas, in truth and in fact, the said alleged debt, and the said supposed deeds had no existence whatsoever, but were pretended to have existence by the said C. R. and J. A. as aforesaid, for the purpose of deceiving, cheating, and defrauding the said W. J. in manner aforesaid, and for no other purpose whatever; to the great injury and deception of the said W. J., to the evil and pernicious example of all other persons in the like case offending, against the peace, etc., and contrary to the form of the statute in such case made and provided.

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said C. R. and J. A., devising and contriving, and wickedly combining and intending to deceive the said W. J., and to obtain from the said W. J. the said sum of five hundred pounds, and to cheat and defraud him of the same, afterwards, to wit, on the said first day of July, in the year of our Lord at the parish of St. George, Bloomsbury, aforesaid, in the county of Middlesex aforesaid, and within the jurisdiction of the said central criminal court, unlawfully, knowingly, and designedly did falsely pretend to the said W. J., that the said J. A. had before then deposited with the said C. R. certain deeds relating to the property of the wife of the said J. A., as a security for the payment to the said C. R. of the sum of five

hundred pounds ; that the said C. R. had afterwards deposited such deeds with a friend of the said C. R., who had then advanced money to the said C. R. upon the security of the said deeds, and then held such deeds as such security as last aforesaid ; and that the said C. R. then required the sum of five hundred pounds for the purpose of recovering possession of the said deeds ; by means of which said several false pretences in this count mentioned, the said C. R. and J. A. did then and there unlawfully, knowingly, and designedly fraudulently obtain of and from the said W. J. one order for the payment of money, to wit, for the payment of the sum of five hundred pounds, then and there being of the value of five hundred pounds, and the property of the said W. J., and one piece of paper of the value of one penny, of the goods and chattels of the said W. J., with intent then and there to cheat and defraud the said W. J. of the said goods and chattels and property ; whereas, in truth and in fact, the said J. A. had not deposited with the said C. R. such deeds relating to the property of the wife of the said J. A., as the said C. R. and J. A. so falsely pretended, as in this count mentioned. And whereas, in truth and in fact, the said C. R. had not deposited such deeds with any friend of the said C. R., as the said C. R. and J. A. so falsely pretended, as in this count mentioned. And whereas, in truth and in fact, no friend of the said C. R., nor any person whatsoever, had then advanced money to the said C. R. upon the security of the said deeds. And whereas, in truth and in fact, no friend of the said C. R., nor any person whatsoever, then held such deeds as any security whatsoever. And whereas, in truth and in fact, the said C. R. did not then require the said sum of five hundred pounds, or any sum of money whatsoever, for the purpose of recovering possession of such deeds, as the said C. R. and J. A. so falsely pretended as in this count mentioned. And whereas, in truth and in fact, such deeds had no existence whatsoever, but were so pretended by the said C. R. and J. A. to have existence as aforesaid, for the purpose of cheating and defrauding the said W. J. as aforesaid, and for no other purpose whatsoever ; to the great injury and deception of the said W. J., contrary to the form of the statute in such case made and provided, and against the peace, etc.

Third count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. A. and C. R. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said central criminal court, unlawfully and wickedly did conspire, combine, confederate, and agree together, and with divers other evil disposed persons, whose names to the jurors aforesaid are as yet unknown, falsely and fraudulently to pretend and cause to appear to the said W. J., that the said J. A. was then indebted to the said C. R. in the sum of five hundred pounds; that the said J. A. had deposited with the said C. R. certain deeds relating to the property of the wife of the said J. A., as a security for the payment to the said C. R. of the said sum of five hundred pounds; that the said C. R. had afterwards deposited such deeds with a friend of the said C. R., who had advanced money upon the security of the same, and by whom such deeds were then held; that the said J. A. was desirous of discharging the said debt due from him to the said C. R., upon the redelivery to the said J. A. of the said deeds, but that the said C. R. was then unable to procure the redelivery to him of the said deeds, for want of money to pay such money so advanced to him upon the security of the same, and to induce and persuade the said W. J., by means of the several false representations aforesaid, and upon the faith and confidence that such deeds really existed, and upon the promise and assurance of the said C. R. that he would deposit the said deeds with the said W. J., for the purpose of delivering the same to the said J. A., and receiving from the said J. A. such debt of five hundred pounds, so to be pretended to be due from the said J. A. to the said C. R., to obtain from the said W. J. divers of the moneys of the said W. J., amounting to the sum of five hundred pounds, for the pretended purpose of obtaining such deeds from such friend of the said C. R., and to cheat and defraud the said W. J. of the same, and mutually to aid and assist one another in carrying out and putting into execution the said unlawful and wicked combination, conspiracy, confederation, and agreement; whereas, in truth and in fact, no such deeds as in this count mentioned then or ever had

any existence whatsoever ; to the great injury and deception of the said W. J., and against the peace, etc.

Fourth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. A. and C. R. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said central criminal court, unlawfully and wickedly did conspire, combine, confederate, and agree together, and with divers other evil disposed persons, whose names to the jurors aforesaid are as yet unknown, by divers false pretences, and by divers false, artful, indirect, deceitful, and fraudulent means, devices, arts, stratagems, and contrivances, to obtain and acquire into their hands and possession of and from the said W. J., divers of his moneys, amounting to a large sum, to wit, the sum of five hundred pounds, and to cheat and defraud him of the same, to the great injury and deception of the said W. J., against the peace, etc., and contrary to the form of the statute, etc.

(569) *For pretending to an attesting justice and a recruiting sergeant that defendant was not an apprentice, and thereby obtaining money to enlist.(a)*

That on, etc., one D. K., then being a sergeant in the invalid battalion of the royal regiment of artillery of our said lady the queen, then and long before was a person in due manner appointed and authorized to enlist persons to serve our said lady the queen as soldiers in the corps of royal military artificers and laborers, and that one S. D. had then lately before enlisted with the said D. K., to serve our said lady the queen as a soldier in the said corps of, etc., and the said S. D., on, etc., at, etc., in order to be attested, pursuant to the statute in that case made and provided, did in his proper person appear before H. L., esquire, then being one of the justices of our said lady the queen, assigned, etc. And the jurors, etc., do further present, that the said

(a) Dickinson's Q. S. 6th ed. 335 (e) ; 1 Stark. C. P. 474. See 8 Vict. cc. 8, 9, and annual mutiny acts ; also R. v. Jones, 1 Leach, C. C. 174. The indentures must be proved by a subscribing witness, if produced (Ib.) ; for the guilt of the offence is constituted by the actual and legal binding.

S. D., late of, etc., being an evil disposed person, and contriving and intending to cheat and defraud the said D. K. of his moneys, and to make it be believed that he the said S. D. was at liberty and eligible to be enlisted, to serve our said lady the queen as a soldier in the corps of, etc., on, etc., with force and arms, at, etc., aforesaid, unlawfully, knowingly, and designedly, did falsely pretend to the said H. L. (he the said H. L. then and there being such justice as aforesaid, and then and there having sufficient and competent power and authority to attest persons to serve our said lady the queen as soldiers in the said corps of, etc.), that the said S. D. was not then an apprentice (meaning that the said S. D. then and there, to wit, on, etc., at, etc., when he so appeared before the said H. L., the justice aforesaid, in order to be attested as aforesaid, was not an apprentice, and that he the said S. D. was then and there at liberty and eligible to be enlisted to serve our said lady the queen as a soldier in the said corps), by means of which said false pretence, he the said S. D. unlawfully, knowingly, and designedly did obtain from the said D. K. the sum of

pounds, of the proper moneys of the said D. K., with intent to cheat and defraud the said D. K. of the same; whereas, in truth and in fact, the said S. D., on, etc., at, etc., aforesaid, at the time when he so appeared before the said H. L., the justice aforesaid, in order to be attested as aforesaid, was an apprentice, and was not at liberty and eligible to be enlisted to serve our said lady the queen as a soldier in the said corps; and whereas, in truth and in fact, the said S. D. was then, to wit, on, etc., an apprentice to G. O.; and whereas, in truth and in fact, the said S. D. was not then, to wit, on, etc., at, etc., at liberty and eligible to be enlisted to serve our said lady the queen as a soldier in the said corps (*insert scianter*), against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(570) *For obtaining more than the sum due for carriage of a parcel by producing a false ticket.*(b)

That A. B., late of, etc., on, etc., at, etc., had in his custody and possession a certain parcel, to be by him delivered to Maria

(b) This was the indictment in *R. v. Douglass* (1 Campb. 212). and it was held, upon the terms of 30 Geo. II. c. 42, that a *basket* is sufficiently described as a *parcel*. It was also held, that if money (as in this case) be obtained from

Countess Dowager of Ilchester, upon the delivery of which he was authorized and directed to receive and take the sum of six shillings and sixpence, and no more, for the carriage and portorage of the same; yet, that the said A. B. produced and delivered to T. H., then being a servant to the said Countess of I., the said parcel, together with a certain false and counterfeit ticket, made to denote that the sum of nine shillings and tenpence was charged for the carriage and portorage of the said parcel, and unlawfully, knowingly, and designedly did falsely pretend to the said T. H., that the said false and counterfeit ticket was a just and true ticket, and that the said sum of nine shillings and tenpence had been charged and was due and payable for the carriage and portorage of the said parcel, and that he the said A. B. was authorized and directed to receive and take the said sum of nine shillings and tenpence for the carriage and portorage of the said parcel, by means of which said false pretences defendant did unlawfully, knowingly, and designedly obtain, of and from the said T. H., the sum of three shillings and fourpence, of the moneys of the said countess, with intent to cheat and defraud her of the same, whereas, in truth and in fact, etc. (*Negative the pretences, and conclude as before.*)

(571) *Pretences that defendant had no note protested for non-payment, that he was solvent, and worth from nine to ten thousand dollars.*(c)

That C. H., late, etc., being a person of an evil disposition, ill-name and fame, and of dishonest conversation, and devising

the servant, who had money of his master in hand at the time, it might be well laid to be the property of the *latter*; but if he had not money enough of his employer in his hands at the time, such master cannot be stated to be the person defrauded.

(c) *People v. Haynes*, 14 Wend. 546. In this case ultimately there was a new trial given by the court of errors, on the ground that where a purchase of merchandise is made, the goods selected, put in a box, and the name of the purchaser and his place of residence marked thereon, and the box containing the goods sent by the vendor and put on board a steamboat designated by the purchaser, to be forwarded to his residence, the sale is complete, and the goods become the property of the purchaser.

It was further ruled that, where after such delivery, the vendor, on receiving information inducing him to suspect the solvency of the purchaser, expressed an intention to reclaim the goods, and the purchaser thereupon made representations in respect to his ability to pay, by means of which the vendor abandoned his intention, and the purchaser was then indicted, charged with the offence of having obtained the goods by false pretences, the representations made by him being

and intending, by unlawful ways and means, to obtain and get into his hands and possession the moneys, valuable things, goods,

alleged as *false pretences*, the sale being complete before the *representations* were made, the defendant could not be considered guilty of the crime charged against him.

The above were the only points adjudged in the decision of the case; the court declining to pass upon the other questions presented by the bill of exception. Those questions are: 1. Whether, admitting the representations made by the defendant to have been made previous to the completion of the sale, and that thereby the vendors were induced to give him credit, such representations can properly be considered *false pretences within the meaning of the statute*; and 2. Whether when, as in this case, *several* pretences are alleged to have been made, and are averred to be false, the public prosecutor is bound to prove *all* the pretences to be false, or whether it is sufficient for less than all to be false, provided that enough be proved to authorize the jury to say that those proved had so material an effect in procuring the credit, or in inducing the delivery of the property, that without the influence of such pretences upon the mind of the party defrauded, he would not have given the credit or parted with the property.

Conclusions arrived at by the chancellor, in the opinion delivered by him in the court of errors:—

“A bill of exception cannot be presented in a *criminal case*, to review the charge of the court, or the finding of the jury upon *mere matters of fact*, where there has been no erroneous decision upon *matters of law*.

“Whether it is competent for a court to grant a new trial in a case of *felony*, at the instance of the defendant, where there has been a palpable misdiscretion of the court upon the mere matters of fact, or a verdict clearly against the weight of evidence without such misdiscretion, where no erroneous decision in point of law is made, *quære*.

“It is not necessary to constitute the offence of *obtaining goods by false pretences* that the owner should have been induced to part with his property *solely and entirely by pretences which were false*. If the jury are satisfied that the pretences proved to have been false and fraudulent were *a part of the moving causes*, inducing the owner to part with his property, and that the defendant would not have obtained the goods, had not the false pretences been superadded to statements which may have been true, or to other circumstances having a *partial influence* upon the mind of the owner, they will be justified in finding the defendant guilty of the offence charged within the letter as well as within the spirit of the act.

“In the present case, although *all* the pretences stated in the indictment, as those upon the strength of which the goods were obtained, are charged to be false; still, if *either* of them was in fact false, was intended to deceive the owners of the goods, and induce them to part with their property, and produced that effect, the indictment was sustained; *one* false pretence is sufficient to constitute the crime, although *other false pretences* are charged.

“To constitute the offence of obtaining goods by false pretences, it is not necessary that any *false token* should be used, or that the false pretences should be such as that *ordinary care* and *common prudence* were not sufficient to guard against the deception.

“The offence consists in *intentionally and fraudulently* inducing the owner to part with his goods or other things of value, either by a *wilful falsehood*, or by the offender *assuming a character* he does not sustain, or by *representing himself* to be in a station which he knows he does not occupy.

“As to the ownership of the goods at the time of the making of the representations, the chancellor was of opinion, that the delivery of the property on board of the steamboat, for the purpose for which it was delivered, *divested* the vendors not only of the *possession*, but of the *title* to the goods;—that they,

chattels, personal property, and effects of the honest and good people of the state of New York, to maintain his idle and profligate course of life, on, etc., at, etc., with intent feloniously to cheat and defraud F. S. C., C. A., and J. H. S., then and there copartners in business, under the firm of C., A., and Co., did then and there feloniously, unlawfully, knowingly, and designedly falsely pretend and represent to C. A., being such copartner, that he, the said C. H., had then no note protested for non-payment, that he was then solvent and worth from nine to ten thousand dollars after the payment of all his debts, that he was perfectly easy in his money concerns, that he had no indorser, and that he had never indorsed more than one note. And the

however, had the right of stoppage *in transitu* in case of the *insolvency* of the purchaser; but that to reinvest themselves with the right of property and possession of the goods, they were bound to take corporal possession of them, or to give notice to the carrier not to deliver them to the purchaser, or to do some other equivalent act. Not having done so, the property in the goods was in the defendant, and consequently he *did not obtain the possession or delivery of them by means of the false pretences* stated in the indictment; and although he probably by his false representations prevented the vendors from exercising the right of stoppage *in transitu*, still he could not be convicted of the charge of *obtaining the goods* by false pretences; for which reason, and that alone, he was of opinion that the judgment of the supreme court ought to be *revised*."

Conclusions arrived at by Senator Tracy, in the opinion delivered by him:—

"The delivery on board the steamboat under the circumstances of the case, was an *absolute* delivery, and vested in the purchaser not only the possession but the title to the goods; and even if the vendors had the right of stoppage *in transitu*, in case of insolvency of the purchaser, the existence of that right did not render the delivery *conditional*, nor could the exercise of it divest the purchaser of the ownership of the goods. The *representations* relied on as false pretences being *subsequent* to such delivery, if they could be considered as *false pretences*, would not therefore subject the defendant to the charge of *obtaining the goods* by false pretences.

"Where there are several pretences alleged in the indictment to be false, *all must be proved to be false*. The offence consists of two distinct elements, to wit, *false pretences*, and *obtaining goods of another*. All the pretences together constitute but one portion of the offence; and every pretence, therefore, set forth and alleged to be false, is a substantive or *constituent element* of the offence, and cannot be deemed immaterial; the *petit jury* can convict only upon the pretences found by the *grand jury*, as it cannot be known that they would have found the bill true, unless it had been proved before them that *all* the pretences found to have been made, had in fact been made and falsely made.

"The words *other false pretence*, in the statute, considered in connection with the other terms used, and the circumstances under which the statute 36 Geo. II. was passed, upon which ours is founded, meant not a *bare naked lie*, unaccompanied with any *artful contrivance* fitted to deceive, although intentionally and fraudulently told, with the purpose of obtaining the property of another; but they mean an *artfully contrived story*, which would naturally have the effect upon the mind of the person addressed, equivalent to a *false token* or *false writing*—an ingenious contrivance, an unusual artifice, against which common sagacity and the exercise of ordinary caution is not a sufficient guard."

said C. A. then and there believing the said false pretences and representations, so made as aforesaid by the said C. H., and being deceived thereby, was induced, by reason of the false pretences and representations so made as aforesaid, to deliver, and did then and there deliver, to the said C. H. five pieces of gros de nap, of the value of thirty dollars for each piece; two pieces of gros de swiss, of the value of eighty dollars each piece; one piece of bombazine, of the value of sixty-four dollars; nine dozen of belt ribbons, of the value of three dollars and fifty cents each dozen; two pieces of black silk velvet, of the value of thirty dollars each piece; one piece of silk, of the value of one hundred dollars; eight pieces of satin levantine, of the value of fifteen dollars each piece; four pieces of figured vestings, of the value of fifteen dollars each piece; of the proper valuable things, goods, chattels, and effects of the said F. S. C., C. A., and J. H. S., and the said C. H. did then and there designedly receive and obtain the said goods, chattels, and effects, of the said F. S. C., C. A., and J. H. S., of the proper valuable things, goods, chattels, and effects of the said F. S. C., C. A., and J. H. S., by means of the false pretences and representations aforesaid, and with intent feloniously to cheat and defraud the said F. S. C., C. A., and J. H. S. of the said goods, chattels, and effects; whereas, in truth and in fact, the said C. H. at that time had a note protested for non-payment; and whereas, in truth and in fact, the said C. H. was then insolvent and unable to pay his debts; and whereas, in truth and in fact, the said C. H. was not then easy in his money concerns, but on the contrary thereof, greatly embarrassed in his affairs; and whereas, in truth and in fact, the said C. H. had indorsers; and whereas, in truth and in fact, the said C. H. was at that time an indorser for persons to the jurors unknown; and whereas, in fact and truth, the pretences and representations so made as aforesaid, by the said C. H. to the said C. A., was and were in all respects utterly false and untrue, to wit, on the day and year last aforesaid, at the ward, city, and county aforesaid; and whereas, in fact and in truth, the said C. H. well knew the said pretences and representations, so by him made as aforesaid to the said C. A., to be utterly false and untrue at the time of making the same.

And so the jurors aforesaid, on their oath aforesaid, do say, that the said C. H., by means of the false pretences aforesaid, on, etc., at, etc., feloniously, unlawfully, falsely, knowingly, and designedly did receive and obtain from the said F. S. C., C. A., and J. H. S. the said goods, chattels, and effects, of the proper valuable things, goods, chattels, and effects of the said F. S. C., C. A., and J. H. S., with intent feloniously to cheat and defraud them of the same, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(572) *Obtaining acceptances on drafts, by pretence that certain goods had been purchased by defendant and were about to be shipped to prosecutor.*

That S. M., late, etc., wickedly devising and intending to cheat and defraud W. C. Jr., and P. P. G., copartners, trading under the firm of C. and G., of their goods, chattels, moneys, and properties, on, etc., at, etc., did request and solicit them the said W. and P., trading as aforesaid, to accept certain drafts or bills of exchange drawn by him the said S. M. on them the said C. and G., for the sum of three thousand dollars each, both dated Philadelphia, May twenty-sixth, one thousand eight hundred and forty-seven, one payable forty days after date, the other payable sixty days after date, and both being drawn to the order of him the said S.; and as the inducement for them the said W. and P., trading as aforesaid, to accept the said drafts or bills of exchange, he the said S. did then and there unlawfully, and fraudulently, and designedly pretend to the said W. C. Jr., then and there being copartner as aforesaid, that he the said S. M. had purchased and had in Pittsburg, ready for shipment, nineteen thousand barrels of flour, and about fifty thousand bushels of wheat, rye, corn, and oats; and that if he the said W. C. Jr., partner as aforesaid, would accept the said two drafts above described, he the said S. would go out to Pittsburg and ship them, the said C. and G., two thousand barrels of flour to cover the said two drafts, and that he the said S. had already ordered to be shipped them the said C. and G. one thousand barrels of flour, to cover a certain other draft or bill of exchange then before drawn by the said S. on the said C. and G., for the sum of six thousand three hundred and seventy-nine dollars and seventy-

six cents, and duly accepted by the said C. and G., and then remaining unpaid; whereas, in truth and fact, he the said S. had not purchased, and had not in Pittsburg ready for shipment, nineteen thousand barrels of flour, and about fifty thousand bushels of wheat, rye, corn, and oats, and he the said S. did not intend to go out to Pittsburg and ship to them the said C. and G. two thousand barrels of flour, to cover the said two drafts of three thousand dollars each, then asked to be accepted, and he the said S. had not ordered to be shipped to said C. and G. one thousand barrels of flour, to cover and secure the payment of the said other draft of six thousand three hundred and seventy-nine dollars and seventy-six cents, drawn by the said S. as aforesaid, and he the said S. then and there well knew the said pretence and pretences to be false and fraudulent; by color and means of which said false pretence and pretences, he the said S. did then and there unlawfully and with intent to cheat and defraud them, the said C. and G., procure and obtain the acceptance of the said firm of C. and G. from the said W. C. Jr., then and there being partner as aforesaid, to and upon the said two drafts of three thousand dollars each, by the writing of the name of the said C. and G. on the face of the said drafts, which said drafts respectively are of the tenor and effect following, to wit:—

“Dollars 3000.

Philadelphia, May 26, 1847.

“Forty days after date please pay to my own order three thousand dollars, and charge the same to account of, Yours, etc.,
S. M.”

“To Messrs. C. and G., Philadelphia.”

[Accepted—C. and G.]

“Dollars 3000.

Philadelphia, May 26, 1847.

“Sixty days after date please pay to my own order three thousand dollars, and charge the same to account of, Yours, etc.,
S. M.”

“To Messrs. C. and G., Philadelphia.”

[Accepted—C. and G.]

being then and there the said two drafts, of the value of six thousand dollars. And the inquest aforesaid do further present, that afterwards, to wit, on, etc., the said S. M., the said drafts being so accepted by the said C. and G., indorsed the same in blank, and that afterwards, to wit, at the respective dates and

times when the said drafts so accepted became due and payable according to the tenor thereof respectively, they, the said C. and G., by reason of the said acceptances, were obliged to pay the amounts thereof, and did pay the sum of six thousand dollars in cash, being then and there the moneys of the said W. C. Jr., and P. P. G., trading as C. and G., to the great damage of them the said C. and G., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(573) *Obtaining acceptances by the pretence that defendants had certain goods in storage subject to prosecutor's order.*(d)

That J. J. M., late, etc., with intent to and contriving and intending unlawfully, fraudulently, designedly, and deceitfully to cheat and defraud O. P. P. and W. T. E., who at the time hereinafter mentioned, to wit, on the ninth day of June, in the year of our Lord one thousand eight hundred and forty-five, were copartners in trade, under the firm of P. and E., of the said city and county, on, etc., at, etc., did falsely, unlawfully, knowingly, and designedly pretend and state to the said O. P. P. and W. T. E., then copartners as aforesaid, that he the said J. J. M. and a certain D. E. T., then copartners in trade, under the firm of T. and M., of the city of New York, then had received from certain persons trading together, under the firm of S. and S., on storage, in certain warehouses of the said firm of said T. and M., in the said city of New York, numbered 24, 26, 28, and 30 Leonard street, twenty-two hundred barrels of cistern sugars, and they the said J. J. M. and D. E. T., copartners as aforesaid, had agreed to hold the same subject to the order of the said firm of S. and S., and that the said T. and M. then had and held the same twenty-two hundred barrels of cistern sugars in the warehouses aforesaid, and the said J. J. M. did then and there execute a certain paper writing, in the words and figures following, to wit: "Philadelphia, June 9th, 1845, received from Messrs. S. and S., on storage in our warehouses, at Nos. 24, 26, 28, and 30 Leonard street, New York, twenty-two hundred barrels of cistern sugars, which we agree to hold subject to their order. T. and

(d) This count was drawn by eminent counsel in Philadelphia, in 1847. The defendant was acquitted.

M." And the said firm of S. and S. did then and there indorse the said paper writing with the following indorsement: "Deliver the within to the order of Messrs. P. and E. S. and S." And the said J. J. M. did then and there deliver to the said O. P. P. and W. T. E., copartners as aforesaid, the said paper writing; whereas, in truth and in fact, the said J. J. M. and D. E. T., copartners as aforesaid, had not received the said twenty-two hundred barrels of cistern sugars in the said warehouses, nor had they the said twenty-two hundred barrels of cistern sugars in said warehouses, nor had they any such warehouses as the said J. J. M. did then and there, to wit, on the day and year aforesaid, at the city and county aforesaid, falsely pretend and state to the said O. P. P. and W. T. E., then copartners as aforesaid. And the inquest aforesaid, on their oaths and affirmations aforesaid, do further present and say, that the said J. J. M. did designedly, by the false pretences aforesaid, with intent to cheat and defraud the said O. P. P. and W. T. E., under the name and firm of P. and E., then and there, to wit, on, etc., at, etc., obtain from the said O. P. P. and W. T. E., then copartners as aforesaid, their acceptance of the following drafts or bills of exchange, drawn by the said J. J. M. and D. E. T., copartners as aforesaid, upon the said P. and E., in favor of themselves, the said T. and M., etc. (*setting forth drafts as in last form*), to the great damage of them the said O. P. P. and W. T. E., copartners as aforesaid, to the evil example of all others in like cases offending, against etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(*Add other counts, setting forth specially the bills obtained, etc.*)

(574) *For receiving goods obtained by false pretences, under the English statute.(e)*

That A. B., late of, etc., on, etc., at, etc., unlawfully, knowingly, and fraudulently did receive ten gold watches, of the value of one hundred pounds, of the goods and chattels of E. F., by one C. D. then lately before unlawfully, knowingly, and designedly obtained from the said E. F. by false pretences,(f) that is to

(e) Dickinson's Q. S. 6th ed. 444.

(f) Essential to be stated; as also that the receiver knew them to be so unlawfully obtained. *R. v. Wilson*, 2 Mood. C. C. 52. "Unlawfully taken and carried away" will not suffice, S. C. Dickinson's Q. S. 6th ed. 444.

say, by falsely pretending that he, the said C. D., was the servant of one G. H., and had been sent by the said G. H. for the said watches, to be inspected by him, whereas, in truth and in fact, he, the said C. D., was not the servant of the said G. H., nor sent by him for the said watches to be inspected by him, or for any other purpose whatever; he, the said A. B., at the time he so received the said gold watches, on, etc., at, etc., then and there *well knowing the same to have been so unlawfully obtained* by the said C. D. from the said E. F. by false pretences aforesaid; against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(574a) *Another form.(g)*

One silver tankard (specifying thing received), of the goods and chattels of J. N., then lately before unlawfully, knowingly, and designedly obtained from the said J. N. by false pretences, unlawfully did receive and have, he, the said J. S., at the time when he so received the said silver tankard as aforesaid, then well knowing the same to have been unlawfully, knowingly, and designedly obtained from the said J. N. by false pretences, against the form, etc.

(g) Arch. C. P. 19th ed. p. 477. This is preferable to form 574, and meets more fully the requirements of *R. v. Wilson*, 2 Mood. C. C. 52; *R. v. Goldsmith*, L. R. 2 C. C. 74.

CHAPTER XI.

DESTROYING A VESSEL AT SEA, ETC.(a)

(575) Sinking and destroying a vessel, the parties not being owners in whole or in part, under the U. S. statute.

(576) Casting away a vessel with intent to prejudice the owners under the English statute.

(575) *Sinking and destroying a vessel, the parties not being owners in whole or in part, under the U. S. statute.*(b)

That A. B., etc., late, etc., and C. D., late, etc., at, etc., on, etc., on the high seas, out of the jurisdiction of any particular state of the United States of America, within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of this court, they the said A. B. and C. D. then and there belonging to a certain vessel, being a called the which said was not owned in whole or in part, either jointly or severally, by them the said A. B. and C. D. or either of them, and which said was then and there the property of some person or persons to the jurors aforesaid as yet unknown, they the said A. B. and C. D. then and there on the day of aforesaid, being in and on board the said on the high seas as aforesaid, did then and there feloniously, wilfully, and corruptly cast away and destroy the said called the against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

(*Same as first count, substituting*): “was then and there the property of then and still being citizens of the United States of America,” for “was then and there the property of some person or persons to the jurors aforesaid as yet unknown.”

(a) See for prosecution for burning a vessel, etc., U. S. v. Lockman, 1 Bost. L. Rep. N. S. 151, Aug. 1848. See also Wh. Cr. L. 8th ed. §§ 1894 *et seq.*

For conspiracy, see *infra*, 639.

(b) This form was used in U. S. v. Snow, in New York, in 1847, without exception being taken to it.

Third count.

That A. B. and C. D., late, etc., heretofore, on, etc., the said A. B. then and there belonging, in the capacity of master (*or otherwise*), to a certain vessel, being a called the the property of a certain citizen or citizens of the United States of America, to wit, of and the said C. D. then and there belonging to the said called the in the capacity of mate (*or otherwise*), of which said they the said A. B. and C. D. were not owners, nor was either of them an owner, did then and there feloniously, wilfully, and corruptly cast away and destroy the said called the against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Fourth count.

That A. B., late, etc., and C. D., late, etc., heretofore, etc., did then and there, in and on board of a certain vessel, being a called the the property of then and still being citizens of the United States of America, to which said they the said A. B. and C. D. then and there belonged, the said A. B. as and the said C. D. as and of which said the said A. B. and C. D. were not owners, nor was either of them an owner, feloniously, wilfully, and corruptly procure the said called the to be cast away and destroyed, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Fifth count.

That the said A. B. and the said C. D., heretofore, to wit, on, etc., did then and there, in and on board of a certain vessel, being a called the the property of a certain person or persons, being a citizen or citizens of the United States of America, to the said jurors unknown, to which said they the said A. B. and C. D. then and there belonged, and of which said the said A. B. and C. D. were not owners, nor was either of them an owner, feloniously, wilfully, and corruptly cast away and destroy the said called the against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Sixth count.

That the said A. B. and the said C. D., on, etc., at, etc., belonged to a certain vessel, being a called the and were then and there, in and on board the said the said A. B. in the capacity of and the said C. D. in the capacity of the said A. B. and C. D. not being owners, either in whole or in part, nor either of them being an owner, either in whole or in part, of the said but the said being then and there the property of then and still being citizens of the United States of America, and that the said A. B. and C. D. so being then and there on the high seas as aforesaid, in and on board of the said as aforesaid, did then and there with force and arms, feloniously, wilfully, and corruptly make a certain hole, of the width of inches, and of the depth of in and through the said by means of and through which said hole, so made as aforesaid, the sea entered, filled, and sunk the said and the said A. B. and C. D. did then and there, by the means aforesaid, feloniously, wilfully, and corruptly destroy said against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Seventh count.

(*Same as sixth count, substituting*): “the said being then and there the property of a certain person or persons, being a citizen or citizens of the said United States, to the said jurors unknown,” for “the said being then and there the property of then and still being citizens of the United States of America.”

Eighth count.

(*Same as sixth count, substituting*): “feloniously, wilfully, and corruptly procure a certain hole, of the width of inches, and of the depth of to be made in and through the star-board side (*or otherwise*) of the said by means of and through which said hole, so made as aforesaid, the sea entered, filled, and sunk the said and so the said A. B. and C. D. did then and there, by the means last aforesaid, feloniously, wilfully, and corruptly procure the said to be cast away and destroyed,” for “feloniously, wilfully, and corruptly make a certain hole, of

the width of inches, and of the depth of in and through the said by means of and through which said hole, so made as aforesaid, the sea entered, filled, and sunk the said and the said A. B. and C. D. did then and there, by the means aforesaid, feloniously, wilfully, and corruptly destroy said .”

(*For final count, see ante, 17, 18, 181 n., 239 n.*)

(576) *Casting away a vessel with intent to prejudice the owners, under the English statute.(c)*

That E. L., late, etc., a certain vessel called the D., the property of A. H. and others, on a certain voyage upon the high seas then being, then and there, upon the high seas, within the jurisdiction of the admiralty of England, and within the jurisdiction of the central criminal court, feloniously, unlawfully, and maliciously did cast away and destroy, with intent to prejudice the said A. H. and another, being part owners of the said vessel, against the form of the statute, etc. And further, etc., that P. M., etc., before the said felony was committed in form aforesaid, at London, aforesaid, and within the jurisdiction of the said central criminal court, did feloniously and maliciously incite, move, aid, counsel, hire, and command the said E. L. the said felony, in manner and form aforesaid, to do and commit, against, etc. (*Conclude as in book 1, chapter 3.*)

(576a) *Another form.*

That J. S., on, etc., at, etc., on board a certain ship, called the the property of J. N., on a certain voyage upon the high seas, then being upon the high seas, feloniously, unlawfully, and maliciously did set fire to the said ship, with intent

(c) *R. v. Wallace, 1 C. & M. 113.*

The statute 1 Vict. c. 89, s. 6, enacts, that “whosoever shall unlawfully and maliciously set fire to, or in any wise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in any wise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or of any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or the freight thereof, or upon any goods on board the same, shall be guilty of felony,” etc. The 11th section of the same statute enacts, that “in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable,” etc.

thereby to prejudice the said J. N., the owner (*or* part owner), of the said ship; (*or* one E. H., the owner of certain goods, being laden and being on board the said ship; *or* one E. F., who had before then underwritten a certain policy of assurance on the said ship, which said policy was then in full force and operation), against, etc.(d)

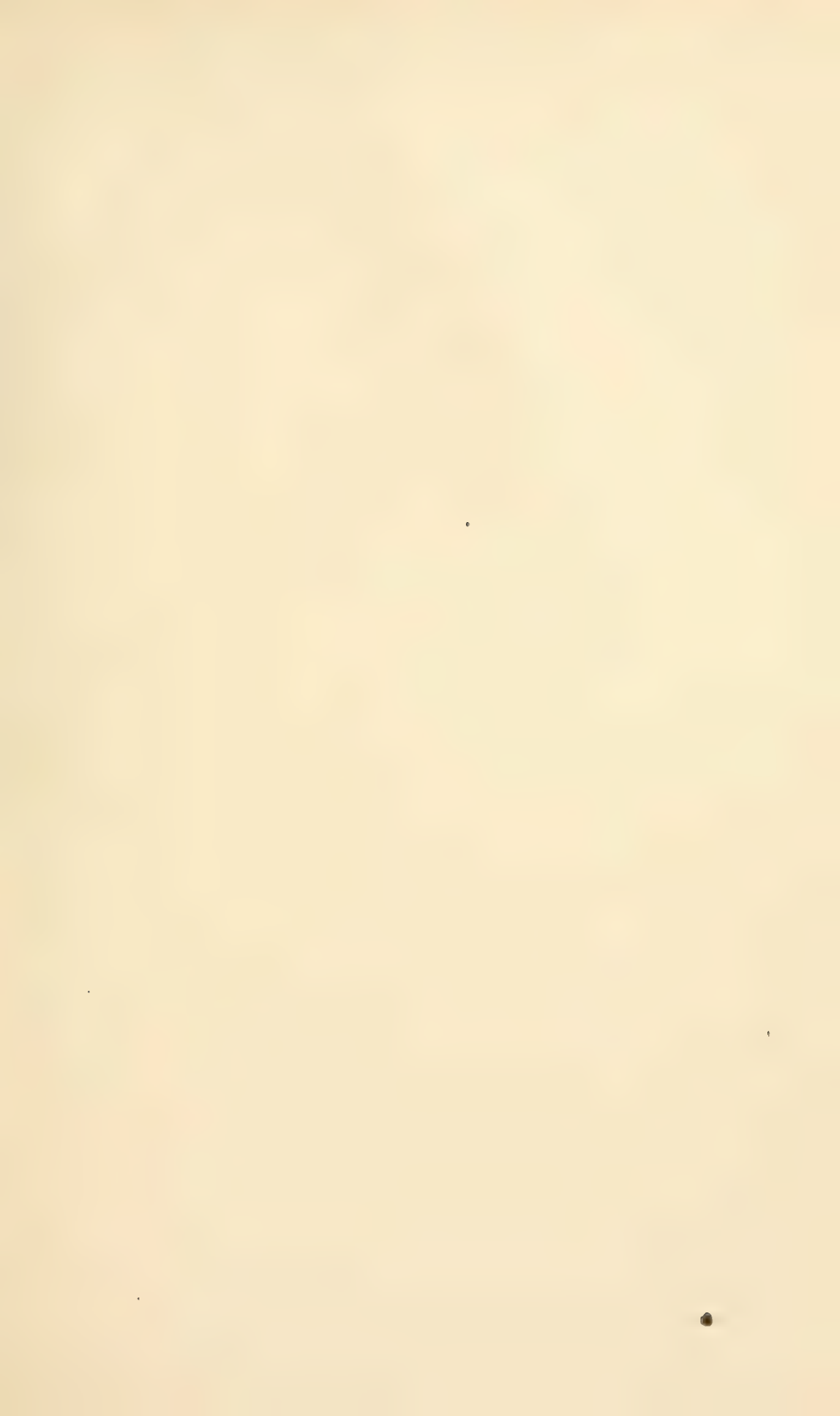
(576b) *Setting fire to ship, under English statute.*

That J. S., on, etc., at, etc., feloniously, unlawfully, and maliciously did set fire to a certain ship called, etc., the property of J. N., against, etc.(e)

(d) Arch. C. P. 19th ed. 565; referring to R. v. Smith, 4 C. & P. 569; R. v. Bowyer, Id. 559.

(e) Arch. C. P. 19th ed. p. 564.





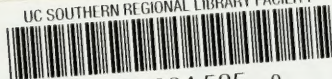


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